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By Professor Lori McMillan

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It’s Been a Wonderful Year

“The hardest part is what to leave behind, ...
... It’s time to let go!”

–Winnie the Pooh

Where to begin ... it has been an incredible year, and I am extremely fortunate that you entrusted me with the leadership of this wonderful Association. My father has always told me to leave a place better than I found it. I would like to think that I have left the Association a bit better than when I came on board. With the help of an excellent Board of Governors and a terrifically dedicated staff, including a new executive director (welcome Jordan Yochim), we have launched many projects this year. My able successors, Lee Smithyman, who will be the KBA president when you read this, and Dennis Depew, who will be president-elect, will be hard at work implementing the projects that we all agreed would be beneficial for the KBA as they develop over the next few years.

This year we have established listserves for each of our sections. We are working on how to better benefit our section members from that service; be it legislative updates or case updates, there is clearly room to improve its use. For our committee and section leaders, we are having two leadership retreats each year to discuss ways to better meet our members’ needs. We have a new website, which needs improvement, but is ready for full development, and which Lee will oversee during the next year. One feature of the website that I am particularly excited about is that the public will be able to search for lawyers and sort them by membership in a section. So a member of the public could, for example, find an elder law lawyer in Ellsworth through our website. Much work still needs to be done, but we are off to a great start. A big thank you to Angel Zimmerman for her yeoman’s work on the economic survey of the legal practice in Kansas. She worked hand in hand with the surveyor, and I believe that the survey will produce information that we will all find useful in planning for our own law practices.

Of all of the highlights of this year, the most enjoyable for me has been travelling to local and specialty bar meetings around the state. I tallied the miles ... 12,340 miles to be precise. Kansas is only 417 miles wide and a drive from New York City to Los Angeles is only 2,777 miles. (For those of you acquainted with my propensities while driving, for the record, not one speeding ticket in all those miles.) Now, our friend Dan Diepenbrock who practices in Liberal might not think that’s a lot. I know our friend Jeff Mason from Goodland won’t be impressed, but for a girl from Wichita, that’s a lot of miles. The specialty bar meetings were great. The Kansas Association for Justice was kind to invite me to their Diamond Jubilee, which was a fabulous affair. The Kansas Association of Criminal Defense Lawyers was very accommodating, and I am told that the KBA president had never attended one of their meetings. I enjoyed meeting with the Kansas Women Attorneys Association, the Kansas Adoption Lawyers, the Kansas Credit Attorney Association, and the Topeka Women Attorneys Association, as well as the Kansas Association of County and District Attorneys. I was humbled by the gracious hospitality of the local bar members. In all, I was welcomed by 27 local bars (my lunch was purchased at 26 – not that I am bitter about the Marion County meeting), and I thoroughly enjoyed each and every one. Whether the local bar meets weekly, monthly, or yearly, the camaraderie is important. I believe participation in our professional associations makes us better lawyers whether it is at the local, state, or national level. What we do for a living is oftentimes hard. People who are not lawyers really don’t understand what we do; our colleagues understand. And, it does wonders for civility in the profession. It is just more difficult to behave badly when you know the lawyer on the other side of a case.

Finally, I must express how grateful I am to my husband Dave, our boys, Boone and Aidan, and my law partners at Tripplett, Woolf & Garretson. Needless to say, they have carried me this year. And, a big “thank you” to opposing counsel (that would include you Bob Kaplan) and the courts for accommodating my, at times, daunting schedule. It has been a great year, and now the KBA will benefit greatly from Lee’s leadership.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
Hon. Ted Ice at the Harvey County Bar Association luncheon in August.

Marion County Bar Association luncheon in August.

12th Judicial District luncheon in September (l-r): Polly Collingwood, Liz Carson, Rachael Pirner, Harry Gantenbein, and Marge Gantenbein.

Editor’s note: In the May Journal president’s column, Brooke Amos was incorrectly identified as Rachel Kibler-Melby. We sincerely apologize for this error.
As part of my duties as a member of the KBA YLS Board of Directors the last few years, and as President of the Section this year, I have had the opportunity to travel all around the state to meet with young lawyers. I have had the opportunity to visit both the Washburn University School of Law and the University of Kansas School of Law on a number of occasions to meet and interact with law students, and educate them on the benefits of bar membership. I have also had the pleasure of attending a number of swearing-in ceremonies for new attorneys. These experiences have left me with the strong impression that the future of the practice of law in Kansas, and the future of the KBA, is bright.

Young lawyers today face many of the same challenges that attorneys have faced for decades. This can be a challenging and difficult profession for new attorneys. Nevertheless, there are also other new challenges, including a difficult economy and the heavy student debt that many carry after law school. Nevertheless, I have personally witnessed young attorneys pull themselves through these circumstances to achieve great things. I have witnessed young attorneys who are working tirelessly to establish their own solo practice selflessly volunteer numerous hours to provide pro bono services. I have witnessed young attorneys who work for public service agencies for reduced pay, because it is the right thing to do, and because they have a passion to help their community and state. I have met young attorneys who have sacrificed the opportunity to have a private practice to enter the various judge advocate general programs in the armed services.

These young lawyers are the future of our profession. While they differ in many aspects from those who came before them, they are the same in their desire to zealously achieve justice for their clients, improve their profession, and improve their communities. They have given their time and expertise to help and encourage the next generation of lawyers. Young lawyers today owe a great amount of gratitude to those lawyers and judges. I can personally attest that my development as a lawyer has been greatly enhanced by lawyers and judges that took time to mentor and encourage me, and have given me great confidence in my skills and abilities.

There is much gloom and doom written about the future of our profession in the media, but I strongly challenge the validity of those stories in Kansas. Our attorneys are bright, caring, and for the most part, very collegial people. I maintain that Kansas is a great place to practice law because it is full of attorneys and judges that, at the end of the day, are striving to do the best for their clients and are trying to seek justice.

It has been a great year for me serving as the president of the Young Lawyers Section. I would like to personally thank all of those people that have helped me and the KBA YLS this year, and the past couple years. Those people are too numerous to name, but you each know who you are. We could not accomplish the things we have in the KBA YLS without the help of dedicated young lawyer volunteers, and without the assistance and support of many other lawyers around the state. The KBA staff is also unbelievably supportive of our KBA YLS activities. It truly has been a great privilege and pleasure to serve as the KBA YLS president.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas Bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
Most entities doing business provide some sort of annual report to their shareholders and stakeholders. In fact, I presented one last year around this time in this column that the KBA so graciously allows me to write. And I’m going to do it again this year though in a revised form. Two things have happened in the meantime that have affected this report. First, as I write this in late April, a letter Chief Justice Nuss sent to Judicial Branch employees says: “More specifically, despite very recent suggestions to the contrary, the Bar Discipline Fee Fund has not been, and will not be, used to fund wages and salaries of the Judicial Branch of Kansas government.” (This fund also funds the Kansas Lawyers Assistance Program). Secondly, Nancy Dixon, the no longer new judicial administrator, has talked with me about outcomes. “Outcomes” is, or was, more of a business concept – part of the body of information that allowed management and shareholders to determine how the company was performing. Lawyers think of outcomes more in terms of “we won” or “we lost.” But in this age of slashing deficits, data on outcomes is an important part of deciding whether a program or fund or department will survive.

In 2001, the budget for KALAP was carved out of the Disciplinary Fee Fund under Supreme Court Rule 206. That Rule sets out very clearly the three-fold purpose or mission of KALAP: (1) To protect the public; (2) to help impaired lawyers; and (3) to educate the bench and bar.

It is difficult to measure how often the public has been protected from malpractice or other misdeeds by lawyers since we are talking about harm that didn’t happen. But we do have information about help for lawyers and education and we might extrapolate some notion of public protection from that.

In 2011, KALAP opened 40 case files. We spoke with approximately 20 more lawyers or third parties but did not open files on those contacts. We opened 48 files in 2010 and eight files carried over. Opening a file involves taking a report from either a third party or the lawyer him/herself. This involves one or more contacts, usually by phone, often followed by a personal visit by myself or other KALAP staff, or Board member or volunteer, which may involve travel (as we are dedicated to the goal of serving ALL lawyers in Kansas). We may provide appropriate books or other resources to the lawyer. If they are willing to work with KALAP, we will most often find them a KALAP volunteer to mentor and monitor them, and formalize that relationship through a contract. The individual lawyer must still do the hard work him or herself. That may be education, therapy, abstinence, improved self-care, or similar efforts. I think one of the things KALAP does best is to help someone get off dead center and take those first few steps into recovery. Making a lifestyle change is scary and it helps to have a guide, or supporter, or even someone who nags on occasion.

We have done a formal outcomes assessment for 2010. It shows that of the 48 contacts we had with lawyers, 32 resulted in an agreement to work with KALAP. Seventeen have completed their contract successfully and eight continue to work with us.

Similarly to many other LAPs around the country, we are increasingly also serving law students and bar applicants. In the past three years, we have been contacted by 40 law students or bar applicants; 25 of those were referred by attorney admissions; three ultimately chose not to apply in Kansas. Nineteen did apply and so far, all have been permitted to take the bar exam. One of the purposes is to make young lawyers aware of resources, including KALAP, so that if they encounter severe stress in the future they will know there is help and hope.

The third purpose for KALAP is the education of the bench and bar to the causes of and services available for lawyers needing assistance. We cannot do this without you, the lawyers of Kansas, who invite us to come make presentations. The KBA has also been fantastic about giving us opportunities. KALAP, board members and staff gave 24 CLE presentations in 2011, to a total audience of approximately 1,850. I must echo KBA President Rachael Pinner that it is truly enjoyable and inspiring to be able to meet and mingle with Kansas lawyers all across the state.

So that is what your money buys with KALAP, and I believe these outcomes support the notion that it is well spent.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.
Electors with Disabilities: Voting Booth Accessibility

By Katherine Lee McBride, Kansas Office of Revisor of Statutes, Topeka, katherine.mcbride@rs.ks.gov

Carolyn Davenport is a registered voter who has a mobility disability. Carolyn’s polling place has several steps at its main entrance. In the past, she has pulled herself up the front steps and used her walker to enter the polling place. There is no signage at the front entrance referencing an alternative entrance. However, the polling place has a side entrance which is accessible, but was locked for the November 2006 election. Due to the inaccessibility of the polling place, Carolyn Davenport had difficulty exercising her right to vote.1

Disability presents two potential barriers to voting. First, accessibility to the polling place is a barrier that challenges many electors with physical disabilities. That includes the ability to enter the polling place, freely move about within voting areas and utilize voting equipment. The unavailability of assistance in the actual casting of a ballot may also serve as a barrier to voting for illiterate electors or electors with visual or learning impairments.2

Federal law provides a number of protections to electors with disabilities throughout the voting process. The Voting Rights Act of 1965 was amended in 1982 to afford blind, disabled or illiterate persons assistance in voting. The 1982 Senate committee recognized that group of electors as “more susceptible than the ordinary voter to having their vote unduly influenced or manipulated.”3 Now, such voters may receive assistance in casting their ballot by a person of their choice.4

The enactment of the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) in 1984 required all polling places at federal elections to be accessible to the elderly and handicapped.5 VAEHA also required states to provide voting aids, including telecommunication device information for the deaf and conspicuously displayed and large-print instructions, in federal elections for handicapped and elderly individuals.

Congress intended for the provisions of the Americans with Disabilities Act of 1990 (ADA) to apply to voting.6 Accessibility to polling places falls within the scope of Title II of the ADA, qualifying as a “service, program, or activity” protected against discrimination by public entities.7 Title III requires the removal of physical barriers within existing buildings, unless the public accommodation can demonstrate that barrier removal is not readily achievable. Alternative methods to removal of architectural barriers include providing curb service or relocating activities to accessible locations. In 2000, the state of New York sought a preliminary injunction under the ADA requiring one of its counties to provide accessible polling places. The court discussed the varying degrees of “feasibility” in complying with ADA requirements:

[It] is feasible to create sufficient handicapped parking places near the entrance of the polling sites through use of acceptable, correctly placed parking signage; it is not feasible for a polling site, where it currently is lacking such, to paint lines outlining designated parking spaces, as it is winter. It is feasible to install door handles that can easily be manipulated by persons using wheelchairs or walkers; it is not feasible for polling sites with doorways that currently are not sufficiently wide enough ...8

In response to the controversy surrounding the 2000 U.S. presidential election, Congress passed the Help America Vote Act of 2002 (HAVA). HAVA required states to replace punch-card and lever-based voting systems, created the Election Assistance Commission to aid in the administration of federal elections and established minimum election administration standards.9 Under HAVA, every polling place must have at least one voting method equipped for electors with disabilities. Federal HAVA funding for eligible state and local governments is being used to make polling place entrances, exits and voting areas more accessible for voters with disabilities.10

In Kansas, all polling places are to be accessible by either permanent or temporary means to any voter having a disability on any day upon which an election is held. K.S.A. 2011 Supp. 25-2710. Additionally, voters who are ill, disabled, lack proficiency in the English language, or are 65 years of age or more may request assistance in casting a ballot. This includes receipt of assistance from a person of the voter’s choice to mark the ballot as the voter directs, voting by provisional ballot or requesting that the voter’s ballot be brought to the polling place entrance or within 250 feet of such entrance. K.S.A. 2011 Supp. 25-1124 and 25-2909.

(Con’t. on Page 13)

FOOTNOTES

4. Assistance may be provided by a person of the voter’s choice other than the voter’s employer, agent of such employer or officer, or agent of the voter’s union. 42 U.S.C.A. § 1973aa-6.
5. 42 U.S.C.A. § 1973ee et seq.
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Law Practice Management Tips & Tricks

The Pomodoro Technique
By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ks/lpm@larryzimmerman.com

A lawyer’s life is so utterly predictable that we should pass out a uniform to-do list to every lawyer along with his or her bar card. The daily to-do list would look something like this:

- Get distracted.
- Be interrupted.
- Lose concentration.
- Become unmotivated.

It is not a condition unique to lawyers. Francesco Cirillo said of his student life that, “It was clear to me that the high number of distractions and interruptions and the low level of concentration and motivation were at the root of the confusion I was feeling.” His efforts to change that personal condition led Cirillo to develop a time-management approach called the Pomodoro Technique. Unlike many time management ideas, Cirillo’s technique and tools are all downloadable for free at his website – pomodorotechnique.com.

You Say Tomato

The Pomodoro Technique derives its name from the first time management tool Cirillo had at hand – a small kitchen timer shaped like a tomato (pomodoro in Italian). He was apparently so easily distracted that he found it challenging to focus on his studies for just 10 solid minutes so he set the kitchen timer to force his attention. It worked and Cirillo began refining his study system based on his own experiences and research others have done on attention and cognition. The end result is a system well-tailored for lawyers with some serious practice management implications.

Among the goals of the Pomodoro Technique are developing habits that cut down on interruptions, keep motivation at a constant level, and refine estimation of time and effort required by tasks. The tools are simple: a timer, a to-do sheet, an activity inventory, and a record sheet (more about these in a bit). Though I remain a big fan of David Allen’s Getting Things Done methods for time management, there is some preparation and planning overhead which can make getting started difficult. The Pomodoro Technique, by contrast, can be started immediately and integrated into a daily routine with no real planning.

Simple Rules, Simple Tools

Beginning a day with the Pomodoro begins with a simple to-do sheet. Just record the tasks before you in the day but do it on paper instead of just floating it around in your head. Once that is completed, you are ready for your first Pomodoro. Cirillo defines a Pomodoro as one 30-minute block of time divided into 25 minutes of concentrated work followed by a five-minute break. (This is easily adaptable to a lawyer’s six-minute requirements by changing it to a 24-minute work period.)

The rules of a 30-minute Pomodoro are strict. It cannot be interrupted – you stay focused and on task for the full 25 minutes or you start over. You stop your work at the bell and do not succumb to “just a few more minutes.” The break is mandatory with research indicating that physical movement is optimal to conclude one Pomodoro and to prepare adequately for the next. The 30-minute Pomodoro is the “base unit” of the technique but a workday is grouped into four sets of Pomodoros or two hours. After each four Pomodoro block, a full 15- to 30-minute break helps restore focus and motivation.

A Pomodoro should be finished straight through at all costs. That appears to ignore the fact that we all face interruptions always. In fact, the Pomodoro Technique is very aware of the problem of interruptions and even divides them between internal (mind wandering to other remembered to-do items) and external (client on line one). The tracking sheet has a simple tool for marking a distraction and creating a new to-do if necessary as well as enforcing some good discipline with external distractions.

Lawyer, Know Thyself

Certainly developing habits of attention and creating an environment where motivation is maintained throughout a day are serious rewards. However, another powerful benefit to the Pomodoro Technique is the tracking it tries to focus at the end of a day. It provides a simple tool to record how long tasks take versus what you had budgeted. This makes each successive day with the Technique more effective and more rewarding as you build a statistical model of yourself in your practice. The economic value of collecting such information about your practice is no small tomatoes.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
I n Shakespeare’s time a wordy lawyer could end up being paraded through Westminster Hall “whilst the Courts [were] sitting” with his legal brief around his neck.¹ Today the court is unlikely to order you to stand in court with your prolix brief hanging about your neck, but it may dismiss your pleading for verbosity.² Judges are busy, as are clients and opposing counsel. They don’t have time to wade through 50-word sentences, digest long block quotes, or decipher antiquated legalese. They expect today’s lawyer to frame the issues clearly and concisely.

Being concise is good for you, too. Concise writing gives your argument greater impact. Not only does it demonstrate respect for the reader’s time and intelligence, but it forces you to fully understand your argument. Burying the issue in convoluted language isn’t clever, it’s insulting:

“The statement for professional services you will find enclosed herewith is, in all likelihood, in excess of what you expected. Under the circumstances, it is incumbent upon me to avail myself of the opportunity to explain why. It is my considered judgment that three factors are responsible for this development . . . .³

This lawyer isn’t fooling anyone – the bill is high. Attempting to hide unpleasant information or unfavorable law in poor writing frustrates the reader, while getting straight to the point puts the focus where it should be. The reasons why the bill is high could be more simply introduced: “The bill I am sending with this letter is probably higher than you expected, and I would like to explain three reasons why . . . .” (reducing 50 words to 23).

To write concisely you must have a thorough understanding of your argument. Anyone can cut and paste quotes into a brief or set out facts of a prior case. Explaining for your reader what those quotes or facts mean in a clear and concise manner requires legal analysis. Stating the rule of law and the relevance of the cited case in your own words shows your reader you expected. Under the circumstances, it is incumbent upon me to avail myself of the opportunity to explain why. It is my considered judgment that three factors are responsible for this development . . . .³

COMING NOW Defendants in the above-styled matter, and pursuant to 28 U.S.C. §§ 1441 and 1446, and within the time prescribed by law, file this Notice of Removal.

“Come now” is an example of outdated language that serves no purpose. The court knows you’re filing this notice now. The court also knows that the defendants filing the notice are the “defendants in the above-styled matter.” Which other defendants would be filing a pleading in this case? And, as any attorney knows, if you haven’t filed your pleading “within the time prescribed by law,” opposing counsel will let the court know. If you must tell the court you met your deadline, simply say your pleading is timely. “Defendants timely file this Notice of Removal under 28 U.S.C. §§ 1441 and 1446” states the author’s point more clearly and is easier to read. Besides, it still sounds like a lawyer.

Quote sparingly. Readers skip over quotes. Instead of re-lying on multiple quotes or large block quotes, analyze the material you want to quote and paraphrase it. This focuses the reader’s attention on the important material and allows you to present the information persuasively. Save direct quotes for emphasis by pulling out meaningful phrases, as in this example: The court rebuked counsel for his wordiness, noting counsel “unfurled” an 18-page statement-of-facts, replete with argument, and a 15-page surreply containing a “great deal of immaterial information.”

FOOTNOTES
Focus the reader’s attention on the subject by using the active voice (where the subject performs the action) – “Defendant shot plaintiff.” The active voice is more direct and typically requires fewer words than the passive voice (where the subject receives the action). Use the passive voice only when you have a good reason for using it; if, for instance, you are intentionally downplaying your client’s actions – “Plaintiff was shot.”

Uncover buried verbs. Nouns ending in -ion, -ment, -ence, and -ent bury the action in surplus words: “defendant was in violation of the law.” Focus the reader’s attention on the action by restoring the verb: “defendant violated the law.”

Omit needless words. Avoid wordy prepositional phrases, unneeded repetition, and needless modifiers.

For the purpose of = to
In order to (for) = to (for)
In regard to = about, concerning, regarding
In terms of = at, in, for, by, with
In the event that = if
In view of the fact that = because
In accordance with = by, under
On the part of = by
With reference to = about
Prior to (subsequent to) = before (after)
As of this date = today
At that point in time = then
At the present time = now

The area of contract law = contract law
Ask the question = ask
Free gift = gift
General consensus = consensus
Null and void = void
Advance planning = planning
Continue on = continue
Past experience = experience

Very important = important, critical
Very big = big, huge, giant, enormous
Pretty incredible = incredible
Rather unusual = unusual

6. You may also find hidden verbs in nouns that end in -al, -ant, -ance, -ancy, -ency, and -ity.

7. Wydick, supra note 3, at 13; Dworsky, supra note 4, at 4, 23.

Electors with Disabilities (Con’t. from Page 10)

Millions of electors visit the voting booth on Election Day. While state and local governments are primarily in charge of ensuring accessibility to the voting booth, federal law provides specific protections to address issues of accessibility for voters with disabilities. Despite the continuing growth of this elector population, the integrity of ballots cast in the voting booth, with or without assistance, must be preserved.

About the Author

Chelsi Hayden is a Lawyering Skills professor at the KU School of Law. She graduated from KU Law in 2001, Order of the Coif, and was a member of the Kansas Law Review. Prior to joining the KU faculty, she served as chambers counsel to the Hon. Carlos Murguia, U.S. District Court for the District of Kansas, and practiced business litigation at Shook, Hardy & Bacon LLP.

Katherine Lee McBride is an assistant revisor for the Kansas Office of Revisor of Statutes and a member of the KBA Diversity Committee. She received her Juris Doctor from Washburn University School of Law in 2010 and is a candidate for a Master of Law in elder law from the University of Kansas School of Law in 2012.

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Proud to be Investment Manager for the Kansas Bar Foundation.
Before we get the ball rolling with how to interact with the KBA on various social media sites, let’s first begin with a social media overview. What is social media? In my various circles I’ve asked that question researching for this article. The varied responses surprised me. The responses varied from Facebook, the arrogant retort “a huge waste of time” (I’ll address that one later), to some pretty level headed definitions including “a way to engage with like-minded people through the Internet,” and “a great way to reconnect with friends from the past.”

The list of social media outlets grows daily and can be overwhelming when you start listing them. A few superstars are now household words; Facebook, MySpace, Twitter, LinkedIn, Flickr, Pinterest, Etsy, Tumblr, Google+, YouTube, and Foursquare to name a few. Then there are hobby-based social media sites, which target a specific pool of people.

“A huge waste of time”; it surprises me to still hear this in a day and age when a 30-second Super Bowl ad costs $3.5 million that some continue to look down their nose at social media as a time waster. Social media basic marketing is FREE! There are those overposters and lurkers in social media. The overposters are the ones you hear about who update their facebook status 5 million times a day or only tweet what they are doing and not interacting with others on twitter. Social media “lurkers” (those are the ones who say social media is a waste of time in most cases) know EVERYTHING about what people post, but never post themselves. I run into the “lurkers” a LOT. I’ll bump into someone in “real life” and they’ll just start asking me about some project I posted or something else I’ve posted. I really have to check myself sometimes. I do put the information out there, so I shouldn’t feel violated … but then comes the creepy factor in that I’ve never seen one post about that person. Always remember, social media is a billboard that stays up forever!

How does the KBA use social media? We use Facebook, Twitter, LinkedIn, and YouTube currently. We are expanding to Tumblr and Google+ in the future. YouTube is being revamped at those times, so check back with us on that one.

Facebook is what I like to think of as the socialite of all the social media the KBA uses. It is a great way for us to interact with our members in the form of pictures from events, updates on upcoming events, providing members information on CLEs, and much more. If you are on Facebook; please “like” our page at www.facebook.com/ksbar.

Twitter (www.twitter.com) is the immediate action social media arm for the KBA. Twitter is “microblogging”; you say what you’re going to say in 140 characters or less. Twitter followers are a completely different audience than Facebook. This is why tying the two accounts together is not only annoying to those who follow you on both, but how you say a message on Twitter is (or should be) completely different from Facebook. If Facebook is the “socialite” Twitter is the “reporter.” Twitter is amazing for calls to action and linking to timely articles that may be of interest to your followers (aka Tweeps). The KBA has three Twitter accounts, the main KBA account (@KansasBar), the legislative update account (@KansasBarLeg), and the Young Lawyer’s account (@KansasBarYLS). I would say three is too many for any organization, because it gets too fragmented. However, the three we have are established and maintained. The legislative account has been particularly effective for calls to action during the legislative session. All other sections wanting to tweet about something will go through our main Twitter feed. This will help our followers stay informed as well as be good marketing for the sections themselves to those who may otherwise not know about other sections.

LinkedIn is the social network for mainly the white-collar office dweller. It’s a professional network whose main purpose is starting to shift a bit. It used to be basically for job seekers and headhunters. As a LinkedIn user, you can upload your resume, find experts and ideas, find new clients, and build your professional reputation. The KBA uses LinkedIn sparce-ly. We have a handful of members very involved and while I’m still trying to find the best way to use LinkedIn for the KBA, I still encourage you to connect with us on LinkedIn at www.linkedin.com/company/kansas-bar-association. This site is becoming friendlier for content like Facebook, but with a professional edge.

Some of you may be thinking, what about Google+, Tumblr, etc.? Everyone has their favorites. Those two in particular will be introduced soon. Google+ to me is Facebook with a “high school clique” feel. I don’t think the “clique” feel is a bad thing. It’s organizing those you +1 (friend on Facebook, follow on Twitter) and who +1 you back into “circles.” You can make multiple circles for example, professional circle, family circle, friend circle, juggler circle, underwater basket weaving circle, and so on. I can see this as a great place for sections and committees to congregate. Tumblr is a blogging site. We will start a weekly blog of what is coming up for the week and other exciting news from your KBA.

Get more out of your membership with the KBA by connecting with us on our social media.
A Nostalgic Touch of Humor

An Unforgettable Day at the “K” with 18,000 Kids

By Matthew D. Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

From time to time, the KBA Journal is reprinting some of Matt Keenan’s most popular columns. With the Royals off to a disappointing start, we go to the vault and reprint this January 2008 column – a classic commentary on a day the Royals, once again, laid a major goose egg.

Res ipsa loquitur means “the thing speaks for itself.” It’s a rule of evidence, rather than substantive law, but it means that the facts permit an inference of negligence. “It doesn’t happen unless someone screwed up” as one might say. Though it is often applied to motor vehicle accidents and airplane crashes, it also has application to something not manufactured in Detroit. A sporting event. A baseball game. More specifically, a Royals game played on Thursday, May 10, 2007. But that wasn’t just any game. It was a sporting event that illustrates another tried and true legal concept — the egg-shelled plaintiff. An event played before thousands of grade school children who were expecting something far different than what transpired that day.

Now before you stop reading and move to the section on new Kansas law developments, permit me further explanation. You see, the Royals have an annual “kids get out of school free day.” Officially it’s “School Day at the K” — unofficially, it’s “Ritalin-free day.” Kids who are hyperactive because it’s a holiday gone completely insane, eating cotton candy, ice cream, and drinking Red Bull. And just when bedlam reached epic proportions, the first pitch was thrown. That’s when we get to the res ipsa part of this story.

Because what followed next was a disaster of Michael Vick proportions. It was, quite simply, a defeat that ranked in the top 20 in the 25 year history of the franchise — and that’s no small statement. The Royals lost 17-3. The following day, the Kansas City Star had bold headlines that blared: “Not in front of the kids!” The story reported: “More than 18,000 kids filed into Kauffman Stadium for the annual ‘School Day at the K.’ That’s a franchise record for the event and believed by club officials to be a major league record for such promotions.” The Star continued: “The youngsters learned all about severe weather from the fine folks at Fox 4 before watching the Royals, now 11-24, conjure up their own brand of disaster.” The box score reported six home runs by Oakland, which tied a Royals record (seven other times).

Now stop and ponder this for a moment — 18,000 kids is more people than in most Kansas counties. It’s more students than at the Blue Valley School district, the largest school district in the state. No one knows from where they came. Or how they got there. Or who supervised them. One of life’s mysteries. No matter. They were all subjected to the rare privilege of watching the starter, Luke Hudson, last two innings and leave the game with an ERA of 18.00. Hudson never appeared in another game the rest of the year and disappeared off the Royals roster forever.

Catcher John Buck, master of the understatement, concluded: “They hit everything we threw.” Buddy Bell added his two cents: “It was a bad day” — this from a man whose entire coaching career has been spent refining such a thing. “It was one of those days that I am not even going to think about. I am going to throw it away.” Easy for him, perhaps, but what about those children?

Not surprisingly, the baseball bloggers had something to say about all this. Some of the choice comments: “Instead of throwing [middle relief Royals pitchers] Todd Wellemeyer and Joel Peralta back to back, why don’t the Royals just forfeit? That would be a 9-0 loss, much better than what we witnessed Thursday.” “Did you know that was the 19th time in Royals history they allowed 17 or more runs? Strangely enough, they’re 0-19 in those games.” “We lost a generation of KC Baseball fans in one game. The A’s were probably grateful. They had to be tired from running around the bases so often!”

The few toddlers who actually stayed in their seats and watched it all unfold (rather than hunt for Sluggerrrr or engage in the countless other activities the Royals offer to avoid watching the game) likely sustained a potential smorgasbord of cognizable injuries — negligent infliction of emotional distress, breach of contract, false imprisonment, just to name a few. All proven by res ipsa loquitur. Because when it comes to proof of a defect, and the subject is the Royals, no further evidence is necessary.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
The Pursuit of Happiness

By Brianna Harris, University of Kansas School of Law, Lawrence

I will always remember the Christmas of 2008. I was standing in a small, run-down church, wearing jeans and a T-shirt, surrounded by more than 400 children eagerly awaiting a Christmas gift. The gifts had been donated to the nonprofit organization I was working for, and I had carefully wrapped many of them myself using old newspaper. It was nearly 100 degrees but no one seemed to notice; this was South Africa after all. Over the next few hours we sang songs, ate hot dogs and rice, and every child came up and got a present; for most it was the only Christmas present they would receive. On that day I remember feeling happy, because I saw happiness on the faces of those around me.

South Africa was my home for almost two years. My husband worked there as a structural engineer while I volunteered with a nonprofit community organization called Amakhaya Rethabile. Amakhaya Rethabile roughly translates into “happy home” or “happy family.” While in South Africa I also took online graduate school courses, and I had a wonderful professor who happened to be a lawyer. Through her “Non-Profit Organizations” class I learned about some of the work public interest lawyers could do. I decided that I also wanted to go to law school, and possibly work in public interest law, although I did not fully understand what that meant at the time. All I knew was that I wanted to do something challenging and fulfilling, and I realized that I did not have to fly half way across the world to help people. Two years ago, upon my return from Africa, I enrolled at KU Law and began my own pursuit of happiness.

But reality hit once I started law school. Will I be able to make enough money to pay my student loans? What kind of law do I really want to practice? Will I even be able to find a job? I had so many ideas in my mind about public interest law, but I’m glad I did not.

South Africa was doing. I could have stayed there solely for the money, but I’m glad I did not.

On the other hand, here are a few things I have found to be true about public interest work:

1. Public interest jobs are typically lower paying than private firms.

This will not come as a surprise to most people, but it was surprising to me just how large the gap can be. This varies depending on the city, the size of the firm and on the type of public interest work, but in general the public interest jobs will pay less.

2. You may get more client interaction and experience early on in your career.

This is what I am told from lawyers who work in public interest. For example in my experience working at Legal Aid last summer I was able to interact every day with clients and to gain valuable hands-on experience.

3. Public interest law encompasses much more than working for a nonprofit organization.

Footnotes

Public interest encompasses a wide variety of opportunities. Public interest law includes all types of government work, from local to state to federal. It also includes careers in academia as well as working for nonprofit or community organizations. Many private law firms also do extensive pro bono work; some firms even have attorneys dedicated to pro bono work.

4. You do not necessarily have to be on law review to get a job.

As mentioned above, the competition for public interest jobs is high, so having law review on your resume will not hurt. Public interest employers may not have class rank cut-offs like big firms do, but they still care about your overall academic and personal achievements. However, from my experience, the number one thing public interest employers are looking for is someone with a genuine interest in the work they do and relevant experience.

At the end of the day, every lawyer’s pursuit of happiness is different. From big firms to solo practice, from government work, from nonprofit or community organizations. Many also includes careers in academia as well as working for government work, from local to state to federal. It also includes careers in academia as well as working for nonprofit or community organizations. Many private law firms also do extensive pro bono work; some firms even have attorneys dedicated to pro bono work.

About the Author

Brianna Harris is a third-year law student at the University of Kansas School of Law. This past year she served as an officer for the Public Interest Law Society and plans to stay active with the organization during her final year of law school. She is currently a member of the Moot Court Council and is also serving as a Dean’s Fellow. She misses all the beautiful people and places in South Africa, and hopes to return for a visit sometime soon.

KWAA Annual Conference – Leadership in Lindsborg

By Bethany Roberts, Kansas Legal Services, Topeka

Each year the Kansas Women Attorneys Association (KWAA) holds its annual conference at Bethany College in Lindsborg, and each year the organization aims to provide at least 12 hours of CLE that is educational, inspirational and above all else, fun. The 23rd Annual conference to be held July 19-21, will encompass all of those traits with the theme “Leadership: Charting the Course.”

The inspiration for the selected theme and a major highlight of this year’s conference will be the keynote speaker, Denise Brosseau. Brosseau is the CEO of Well-Connected Leader. The KWAA is fortunate to have Brosseau visit Lindsborg to share her dynamic and engaging program, which she has presented to past and current Fortune 500 clients. Brosseau began her career in the high-tech industry, with executive positions at Kensington and Motorola. She then co-founded the Forum for Women Entrepreneurs (now Watermark); Invent Your Future Enterprises; and the Springboard Venture Forums, which have led to more than $5 billion in funding for women-led businesses.

On Thursday, July 19 at 7 p.m., Brosseau will be presenting “Moving From Leader to Thought Leader” at the Burnett Center, located on the Bethany College campus. This free event is open to the public. This upbeat and informative keynote will re-engage attendees in marketing themselves as having an expertise in a field of thought or topic; review the spoken and unspoken responsibilities of assuming a leadership role; and offer tips, tools, and tactics from other leaders of all ages and backgrounds who have successfully transitioned from leader to thought leader.

Justice Carol Beier, Judge Michael Buser, and Judge Tom Malone will join the conference for the popular staple and always amazing – Appellate Court All-Star Review. In addition, KWAA has added Trends in the Federal Courts with Judge Thomas Marten, Judge Robert Nugent, and Judge Karen Humphreys at this year’s conference. Adding to the KWAA’s long-standing tradition of providing CLEs in a variety of topics, this year’s programs range from basics like Family, Bankruptcy, and Traffic Court law to Legal Issues When Caring for an Elderly Parent, and the Kansas Fraudulent Transfer Act.

Although CLEs are an important element of practice, conference attendees can look forward to many off-topic distractions. The KWAA conference includes plenty of opportunities to network with attorneys statewide and restore old friendships, while fostering new connections. In addition, ample opportunities arise to visit Lindsborg’s unique galleries and shops. Of course, no trip to Lindsborg would be complete without a trip to the Ol’ Stuga, where adult beverages only add to the energetic legal discussions.

Gentleman, please do not be discouraged by the misnomer that the KWAA is limited to women attendees as the name suggests; the organization and conference is open to male registrants. For a full schedule and registration information, interested attendees may visit www.kswaa.com. Join the KWAA for an engaging three days, where you will come as a leader and leave as not only a thought leader, but with new friends, lots of memories, and of course, a full transcript of CLE.
Members in the News

Changing Positions

Kim E. Christiansen has joined the Department of Agriculture, Topeka, as chief legal counsel.

Stephen R. Eck has been appointed as vice president and general counsel for Oklahoma Christian University, Oklahoma City.

Matthew J. Eickman has joined Benefits Advisory Practice, Overland Park.

Trinidad P. Galdean has joined Hinkle Law Firm, Wichita.

Desarae G. Harrah has joined Martin, Leigh, Laws & Fritzlen P.C., Kansas City, Mo., as a partner.

Seth A. Jones has joined the Law Offices of Richard L. Hines P.A., Erie.

Kristen L. Larson has joined the State of Montana Office of the Appellate Defender, Helena, Mont., as an assistant appellate defender.

W. Thomas Stratton Jr. has been named vice president of community impact by United Way of Greater Topeka, Topeka.

Matthew P. Strobbe has joined Hughes, Hubbard & Reed LLP, Kansas City, Mo.

Kelsey A. Taylor has joined Minter & Pollak, Wichita.

Katie M. True-Awtry has joined Sprint NexTel, Overland Park.

Miscellaneous

Charles A. Peckham, Atwood, has been appointed by Gov. Sam Brownback to the Solid Waste Grants Advisory Committee.

Rachael K. Pirner, Wichita, has been elected to the Larksfield Place Retirement Community Inc. board of directors.

Craig W. West, Wichita, has been inducted as a fellow of the American College of Trial Lawyers.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Obituaries

Larry O. Denny

Larry O. Denny, 69, of Kansas City, Mo., died March 7, at Kansas City Hospice House from lung cancer. He was born June 25, 1942, and graduated from Shawnee Mission East High School in 1961. He attended Baker University and later transferred to the University of Kansas, where he earned both Bachelor of Science and Juris Doctor degrees and was a member of the Kappa Sigma social fraternity.

Denny practiced law in Kansas City from 1968 until his death, and he was admitted to practice in Kansas, Missouri, Colorado, and California. He first worked as an attorney for Legal Aid and then as a sole practitioner with an emphasis in Social Security law.

Denny was preceded in death by his wife, Toni Sena; and his parents, Lisle O. and Elizabeth A. Denny. Survivors include his sister, Joanne O. Cantrill; his nephew, David B. Cantrill; and his niece, Debbie A. Clark.

Richard J. Massieon

Richard J. Massieon, 65, of Seneca, died March 25, at his home. He was born southwest of Wamego on November 18, 1946, the son of Robert L. and Patricia L. White Massieon. He was raised on a farm in the Laciede community northeast of Wamego. He graduated from Wamego High School in 1964 and attended Kansas State University, where he was a member of the football team. He graduated in 1968 with a bachelor’s degree in pre-law and then went onto graduate from the University of Kansas School of Law in 1971 with a juris doctorate, where he was a member of the Phi Delta Phi legal fraternity.

Massieon served as a research attorney for Kansas Supreme Court Justice Roger Kaul before moving to Seneca and opening Massieon Law Office. He was elected two terms as the Nemaha County attorney, served 29 years as the Seneca city attorney, and four years as the Onaga city attorney. He was a member of the Kansas Bar Association and served as president of the Nemaha County Bar Association, treasurer of the Northeast Kansas Bar Association, and was on the 22nd Judicial Bench-Bar Committee. Massieon served as president of the Seneca Jaycees, Seneca Chamber of Commerce, and Seneca Rotary; was assistant scoutmaster and scoutmaster of Troop 71; was Order of the Arrow; Silver Eagle Advancement chair; served on the Seneca Economic Development Committee, the Seneca Doctor Procurement Committee, and the Kansas University School Admissions Panel; and was a member of Seneca Legion Post 21, Knights of Columbus Council 1971, Kansas State University Golden Cat Club, and the Nemaha County Historical Society.

He was preceded in death by his parents Robert and Patricia Massieon. Massieon is survived by his wife, Mary, of Seneca; two sons, Andy Massieon, of Olathe, and Mark Massieon, of Kansas City, Kan.; a daughter, Mary Blachly, of Olathe; a brother, Robert Massieon, of Wamego; a sister, Jacqueline Winter, of Scottsdale, Ariz.; two step-children, Nicholas Roybal, of St. Joseph, Mo., and Angelina R.M. Romero, of Santa Fe, N.M.; five grandchildren; and three step-grandchildren.

The Hon. Thomas L. Toepfer

The Hon. Thomas L. Toepfer, 61, of Hays, died April 30 at his home. He was born October 4, 1950, in Hays to Anthony Lyle and Mary Alice (Clark) Toepfer. He was a 1968 graduate of Hays High School, a 1972 graduate of Fort Hays State University with a degree in economics, and a 1975 graduate of Washburn University School of Law. While at Washburn, he was director of the Neighborhood Youth Corps program and assistant to the director of federal programs for Topeka public schools.

Toepfer served as a district judge in the 23rd Judicial District for nearly 12 years until his retirement in March. Prior
to his election to the bench, he was in private practice for 24 years and was the city prosecutor for 23 years.

He was a member of the Kansas Commission on Judicial Qualifications; member and chairman of the St. Anthony Hospital board of trustees; a founding member and chairman of Hays Medical Center board of directors; served as a member and president of Hays USD 489 Board of Education and St. Nicholas of Myra Catholic Parish Council; and member of the Comeau Catholic Campus Center building committee. Toepfer was also a member of the Ellis County and Kansas bar associations, a past member of the Cancer Council of Ellis County and Kansas District Judges Association executive committee.

He is survived by his wife, Mary Glassman, of Hays; three sons, Russell Toepfer, of Olathe, Matthew Glassman, of Boston, and Anthony Glassman, of Hays; a daughter, Andrea Paul, of Hays; five brothers, Bill Toepfer, of Shawnee, Phil Toepfer, of Hays, Father John Toepfer, of Colorado Springs, Colo., Mark Toepfer, of Columbia, Ill., and Patrick Toepfer, of Hays; four grandchildren; his parents, Anthony and Mary Alice Toepfer, of Hays; and in-laws, John and Rosie Desmarre, of Hays. He was preceded in death by his sister, Kathleen Toepfer.
Recent Developments in US Nonprofit Taxation: The Pension Protection Act Takes Effect

By Prof. Lori McMillan

Endnotes begin on Page 25.
The year 2010 was an important year for many nonprofit organizations. According to a list compiled by the IRS, more than 275,000 organizations in the United States lost their tax-exempt status that year, of which were nonprofit organizations in Kansas. Even closer to home, the capital of Kansas, Topeka, is a small city, and yet it had 250 organizations listed by the IRS as nonprofits that have failed to file one of the various 990 forms in order to preserve their tax-exempt status. This affects many small communities across the country, regardless of size, especially given the importance of nonprofit organizations to American civil society.

This article will briefly introduce nonprofit organizations and their unique ability under 501(c)(3) in the tax code to be exempt from federal income taxes. Also, it will briefly explain what the law was and what the law is now – and how this change has left many organizations unaware of losing their tax-exempt status. Last it will cover the basic steps an organization should take to retain its unique status as a tax-exempt organization.

Overview of the Nonprofit Sector

When speaking about charities, nonprofits, and tax-exempt organizations, most people use the terms interchangeably. However, according to the IRS, “the terms nonprofit and tax-exempt are not synonymous. Nonprofit status is determined by STATE law, which governs organizing documents. Tax-exempt status is governed by FEDERAL law. Thus, all tax-exempt organizations are nonprofit, but not all nonprofits are necessarily tax-exempt.”

Also worth mentioning, although not intuitive on the surface, most nonprofit organizations are allowed to do and indeed make a profit. For example, many of the hospitals in the United States are tax-exempt nonprofits – and many of those hospitals are actually very profitable. Thus, the primary difference between a for-profit business and a nonprofit organization is what each entity is allowed to do with that profit. The essential hallmark of a nonprofit organization is that it does not distribute excess revenue to its owners or shareholders. Those surplus funds remain with the organization to pursue its goals. Nonprofits are generally service organizations or organized charities. A nonprofit may be organized informally or formally, but there are considerable advantages to formally structuring the organization, which can be done in three general ways: (1) Unincorporated Association; (2) Charitable Trust; and (3) Nonprofit Corporation.

Incorporation of a nonprofit organization (which is done on the state level), allows it to exist as a separate legal organization. It allows the organization to own property, have its own bank account, and continue after the founder’s death. It also provides protection from personal liability for the operations of the organization – and incorporation facilitates the organization receiving a tax-exempt status from federal income tax.

Another important point to mention is this: “Not all exempt organizations are eligible to receive tax-deductible charitable contributions. Organizations that are eligible to receive deductible contributions include most charities described in section 501(c)(3) of the Internal Revenue Code and, in some circumstances, fraternal organizations described in section 501(c)(8) or section 501(c)(10), cemetery companies described in section 501(c)(13), volunteer fire departments described in section 501(c)(4), and veterans organizations described in section 501(c)(4) or 501(c)(19).”

The most common status is 501(c)(3) tax-exempt status – which will be discussed in more detail below. It is typically obtained by filing Form 1023 with the IRS. There is a fee with filing. Some organizations, although very few, may receive 501(c)(3) status without filing a 1023. The first class of section 501(c) organizations includes churches, their integrated auxiliaries, and conventions or associations of churches. The second class includes organizations that are not private foundations and have gross receipts that normally are not more than $5,000. All other organizations must file a 1023 in order to be considered a tax-exempt organization under 501(c)(3).

Section 501(c)

The most popular and most common nonprofit organizations generally find tax-exempt status under 26 U.S.C. § 501(c) of the tax code and are thus commonly referred to as “501(c)(3)s.” The Internal Revenue Code, under 26 U.S.C. § 501(c), provides that 28 types of nonprofit organizations are exempt from some or all federal income tax. The three most common are religious, educational, and charitable. “To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for exempt purposes set forth in section 501(c)(3), and none of its earnings may inure to any private shareholder or individual. In addition, it may not be an action organization, i.e., it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates.”

We will not go into detail about those requirements here, but they are laid out in Sections 503 through 505 for those who are interested. There are advantages to receiving 501(c)(3) status besides the obvious one of being exempt from federal income tax. These other advantages include the following:

1. Tax deductible contributions;
2. Possible exemption from state income, sales, and employment taxes;
3. Reduced postal rates, and
4. Possible tax-exempt financing.

Under Section 511 of the tax code, a 501(c) organization is subject to tax on its “unrelated business income” – whether or not the organization actually makes a profit. However, unrelated income may not include things like selling donated merchandise, certain business or trade activities which are carried on by volunteers, or even certain bingo games. Disposal of donated goods worth more than $2,500, or acceptance of goods valued over $5,000 may also trigger special filing and record-keeping requirements. The following is taken from the IRS website:
501(c)(3)s have either a public charity or a private foundation designation. The primary difference is the 501(c)(3)’s source of financial support. Generally, a public charity has a broad base of support while a private foundation has very limited sources of support. In addition, there are different tax rules that apply to each. For example, private foundations are subject to excise taxes that are not imposed on public charities.17

As previously mentioned, one major advantage 501(c)(3) organizations have is the ability to allow those who make donations to the organization to make them tax deductible. Under 26 U.S.C. § 170, the donor who makes the charitable contribution may deduct it for federal income tax purposes. Obviously that element is vital to many nonprofit organizations that have filed a 1023 and received approval from the IRS to function as nonprofits. This status is maintained and updated through a yearly filing – each organization is required to file one of the various 990 forms yearly. It is interesting to note that many churches, although they are not required to file a Form 1023 to be tax-exempt, will actually file a 1023 in order to be listed in § 170 for the specific purpose of ensuring their donors that it is a tax deductible donation. So the take away point is this: If these organizations lose their tax-exempt status due to a failure to file a 990, the likely result would be a dramatic decrease in donations simply because those donations would not be tax-exempt for the donor.

Changes in the Law

Prior to August 2006, smaller nonprofit organizations did not need to make an annual filing with the IRS in order to retain their tax-exempt status. On August 17, 2006, President Bush signed the Pension Protection Act of 2006.18 The Pension Protection Act essentially made three changes affecting tax-exempt organizations and the way they had previously functioned. The first change mandates all tax-exempt organizations to file an annual return with the IRS; the only exceptions to filing were churches and church-related organizations.19 What that means is that small organizations (organizations with gross receipts of $25,000 or less)20 that never had to file before now must file annually. The second change addresses organizations that have failed to file for three consecutive years. Many of those companies were unaware of the changes in the law, and if a company goes three years without filing it will automatically lose its federal tax-exempt status. The IRS rolled out a one-time voluntary compliance program for 990-N and 990-EZ filers that ended October 15, 2010. That program was to help those who have failed to file for the past three years retain their tax-exempt status. The third change requires that 501(c)(3) organizations that file unrelated business income tax returns (Forms 990-T), which all organizations must do if they receive income from business-like activities, make those tax forms available for public inspection upon request.21

The IRS made an extensive outreach to alert organizations that were at risk of losing their tax-exempt status. The first organizations that were subject to the change, in order to avoid the three-year rule, should have filed on May 17, 2010. The IRS reported that many organizations did not meet the deadline. IRS Commissioner Doug Shulman responded to the situation in July 2010 saying:

We’re offering a two-part program to bring small organizations back into compliance. First, we’re extending the filing deadline to Oct. 15 for the smallest organizations, those with gross receipts of $25,000 or less. These are the groups that have to file the Form 990-N, the e-postcard. It’s very simple. All they need to do is provide eight information items. If an organization goes to our Web site, IRS.gov, supplies those eight items, and files electronically by Oct. 15, it will be back in compliance and its tax-exempt status will be intact.

We’re also offering relief for somewhat larger organizations, which are eligible to file the Form 990-EZ. For these groups, we’re launching a voluntary compliance program. Under this program, you file your three delinquent returns and pay a small fee. As long as you file by Oct. 15, you won’t lose your tax exemption. I should note that none of this relief is open to larger organizations that have to file the Form 990 or to private foundations that file Form 990-PF. ...22

The October 15, 2010, deadline has obviously passed. It is difficult to tell how successful the IRS was in their outreach program in raising awareness about filing a 990 and taking advantage of the voluntary compliance program. Although some organizations surely missed the deadline and lost their tax-exempt status, the Form 990 is still very relevant and people need to be aware of what it is and how often it needs to be filed.

A Basic Overview of the Form 990

This all leads to the question of “What is the Form 990?” The official title of the IRS Form 990 is: “Return of Organization Exempt From Income Tax.” It is the annual report filed with the IRS by nonprofits. Note – Form 990 is filed with the IRS, and one should not file it with the Kansas Department of Revenue.23 The purpose of a 990 is to provide the IRS with annual financial information from both tax-exempt organizations and nonprofit organizations. Another purpose is to help prevent abuse of the tax-exempt status; since 2009 the IRS has required more information and more disclosure on the governance and board of directors of the larger nonprofits. Yet another purpose is to enable the public to have access to that information. In many instances, it is the only source of that information. The IRS has been very clear that returns are to be made available to the public:

Exempt organizations generally must make their annual returns available for public inspection. This also includes the organization’s application for exemption. In addition, an organization exempt under 501(c)(3) must make available any Form 990-T, Exempt Organization Business Income Tax Return. These documents must be made available to any individual who requests them, and must be made available immediately when the request is made in person. If the request is made in writing, an organization has 30 days to provide a copy

line. IRS Commissioner Doug Shulman responded to the situation in July 2010 saying:

We’re offering a two-part program to bring small organizations back into compliance. First, we’re extending the filing deadline to Oct. 15 for the smallest organizations, those with gross receipts of $25,000 or less. These are the groups that have to file the Form 990-N, the e-postcard. It’s very simple. All they need to do is provide eight information items. If an organization goes to our Web site, IRS.gov, supplies those eight items, and files electronically by Oct. 15, it will be back in compliance and its tax-exempt status will be intact.

We’re also offering relief for somewhat larger organizations, which are eligible to file the Form 990-EZ. For these groups, we’re launching a voluntary compliance program. Under this program, you file your three delinquent returns and pay a small fee. As long as you file by Oct. 15, you won’t lose your tax exemption. I should note that none of this relief is open to larger organizations that have to file the Form 990 or to private foundations that file Form 990-PF. ...22

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of the information, unless it makes the information widely available.\(^24\)

However, the donor lists are not public information. “The list of donors filed with Form 990, Return of Organization Exempt From Income Tax, is specifically excluded from the information required to be made available for public inspection by the exempt organization. There is an exception; private foundations and political organizations must make their donor list available to the public.”\(^25\)

Briefly, the differences between the 990-EZ, 990-PF, 990-N, 990-BL, 990-T, and 990 are as follows.

Form 990-PF is filed in lieu of Form 990, and is for a private foundation organization, which no longer meet a public support test under sections 509(a)(1) and 170(b)(1)(A)(vi) or section 509(a)(2). Generally a private foundation has a very limited source of support and is thus treated differently by the IRS. For example: a well known, and coincidently the largest private foundation in the world is The Bill & Melinda Gates Foundation.

Form 990-BL is for the Black Lung benefit trust and is filed instead of a Form 990. Form 990-BL is for a very limited purpose and likely does not apply to any reader of this article. It is mentioned so that if you do come across it, you will at least know what it is and if it might be germane for what you’re working on.

A Form 990-T is entitled: Exempt Organization Business Income Tax Return. If an organization has a $1,000 or more of gross income from an unrelated business,\(^26\) it must file a 990-T in addition to any 990, 990-EZ, or 990-PF required. The filing date for a Form 990-T is no later than the 15th day of the 5th month following the end of the organization’s accounting period. For example, if your tax year ended on December 31, the 990-T is due May 15 of the following year. A 990-T must also be made available to the public for inspection upon request. Again, this allows a mechanism for the public to have access to the information. A second purpose is to prevent internal corruption and abuse of the nonprofit and tax systems.

Form 990-N, also called an e-postcard, is an electronic notice that small nonprofit organizations must file each year.\(^27\) An organization will need to file an annual e-postcard if it meets the following requirements: (1) It is tax-exempt; (2) has gross receipts of $25,000 or less; (3) and is not required to file another IRS form – i.e., Form 990, Form 990-EZ, or Form-PF. The “due date” for filing is by the 15th day of the 5th month after your nonprofit’s fiscal year ends.

The IRS will want the following pieces of information:\(^28\)

- Organization’s Employer Identification Number (EIN), also known as the Taxpayers Identification Number (TIN)
- Tax Year
- Organization’s name and any other names your organization uses
- Organization’s mailing address (usually the council secretary’s address)

- Organization’s website address (if applicable)
- Name and address of a principal officer of the organization
- Organization’s annual tax period
- A statement that the organization’s annual gross receipts are normally $25,000 or less
- If applicable, indicate if the organization is going out of business

Form 990-EZ and Form 990. Annual information returns for larger charitable organizations to file are either the 990 Form or the 990-EZ Form. “Form 990-EZ is the short form for other 990 filers; ... Form 990 is the long form that other 990 filers ... must file.”\(^29\) For the 2009 tax year, which is filed in 2010, a nonprofit whose gross receipts are over $500,000 and whose total assets are over $1.25 million will need to file a Form 990. If the organization is smaller, i.e. – gross receipts less than $500,000 and total assets of less than $1.25 million, it may file a Form 990-EZ or a Form 990 if it prefers. The Form 990-EZ requires less information from the organization and generally takes less time to complete.

Here are two charts showing the breakdown of who files what. These are taken from the IRS website:\(^30\)

<table>
<thead>
<tr>
<th>2009 Tax Year (Filed in 2010 or 2011)</th>
<th>Form to File</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross receipts normally ≤ $25,000</td>
<td>990-N (e-Postcard)</td>
</tr>
<tr>
<td>Note: Organizations eligible to file the e-Postcard may choose to file a full return</td>
<td></td>
</tr>
<tr>
<td>Gross receipts &lt; $500,000, and</td>
<td>990-EZ or 990</td>
</tr>
<tr>
<td>Total assets &lt; $1.25 million</td>
<td></td>
</tr>
<tr>
<td>Gross receipts ≥ $500,000, or</td>
<td>990</td>
</tr>
<tr>
<td>Total assets ≥ $1.25 million</td>
<td></td>
</tr>
<tr>
<td>Private foundation</td>
<td>990-PF</td>
</tr>
</tbody>
</table>

This changed in 2011, and the amounts for 990-N, 990-EZ, and 990 filers went down. The 990-EZ filers are now those with gross receipts of less than $200,000 and total assets of less than $500,000; and the very large organizations needing to file a 990 are now those over the previously mentioned amounts. The chart is taken from the IRS website and is as follows:\(^31\)

<table>
<thead>
<tr>
<th>2010 Tax Year and Later (Filed in 2011 and Later)</th>
<th>Form to File</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross receipts normally ≤ $50,000</td>
<td>990-N</td>
</tr>
<tr>
<td>Note: Organizations eligible to file the e-Postcard may choose to file a full return</td>
<td></td>
</tr>
<tr>
<td>Gross receipts &lt; $200,000, and</td>
<td>990-EZ or 990</td>
</tr>
<tr>
<td>Total assets &lt; $500,000</td>
<td></td>
</tr>
<tr>
<td>Gross receipts ≥ $200,000, or</td>
<td>990</td>
</tr>
<tr>
<td>Total assets ≥ $500,000</td>
<td></td>
</tr>
<tr>
<td>Private foundation</td>
<td>990-PF</td>
</tr>
</tbody>
</table>
So again, all 501(c)(3) organizations need to file a 990 Form of some type, except churches and very small charitable organizations.

This is a point worth emphasizing because the primary organizations affected by the change in the law were the very small charities (those with gross receipts of less than $25,000): Very small charitable organizations will need to file a 990-N, also known as an e-Postcard every year. As previously mentioned, “The e-Postcard is due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year.”32 Some organizations likely missed their October 15 deadline, but many organizations have later deadlines and should file their 990-N (also called an E-postcard) as soon as possible. If an extension is needed, use Form 8868, Application for Extension of Time to File an Exempt Organization Return, to request an automatic three month extension.33

The deadline has passed for the one-time voluntary compliance program (VCP). It was only for 990-N (e-Postcard) and Form 990-EZ filers. The IRS issued a one-time relief under IR 2010-87 through Oct 15, 2010. So, it is hoped those filers previously mentioned (990-N and 990-EZ) who had failed to file in previous years, took advantage of the one-time voluntary compliance program and got their filings in before October 15.34 It was a three-step process: (1) filing complete forms for 2007, 2008, 2009 (or the years you are missing) by October 15, 2010; (2) submitting a signed checklist agreeing to the terms of the voluntary compliance program; and (3) paying a reduced compliance fee.35 That needed to be submitted by October 15, 2010 – no extension was available.36

Again, there are serious ramifications for not complying with the IRS filing mandates. The most obvious consequence is loss of 501(c)(3) status. Failing to file a 990-N (also called an e-Postcard), or failure to have taken advantage of the voluntary compliance program for 990-N filers or 990-EZ filers, will result in an organization’s loss of its tax-exempt status. It also means that donors can no longer take tax deductions for their contributions to the organization, effective as of the date of revocation. For most organizations that would result in a severe decrease in revenues. If that occurs, the only way to regain tax-exempt status is to start over by filing another 1023. This takes money and time, and the status is generally not retroactively reinstated. A revoked organization can petition the IRS for retroactive reinstatement, but it must demonstrate that it had “reasonable cause” for not filing the required returns for three consecutive years, and the IRS may approve this request at its discretion.37 Some transitional relief has been provided for small exempt organizations that apply for reinstatement, but it must be requested with a postmark no later than December 31, 2012. That relief provides for a smaller application fee of $100 and reduced criteria for retroactive reinstatement.38

The IRS has provided some very useful tools to educate the public and inform professionals. One example is the IRS “Stay Tax-Exempt” website at www.stayexempt.irs.gov. The IRS has a number of very user-friendly tutorials and links there.39

It is worth mentioning some of the other activities that will put an organization at risk of losing tax-exempt status. First, an organization should avoid private benefit or inurement completely – i.e., activity that will substantially benefit the private interest of any individual or group; second, it should be very limited in any lobbying – if lobbying activities are “substantial” then an organization will lose its tax-exempt status; third, it should not do any political campaigning – the IRS is very adamant about this, and one would do well to distance the organization from any political campaigning to any degree; fourth, it should avoid activities that generate excessive unrelated business income – the IRS wants to ensure that there are not any cloaked organizations out there receiving an unintended tax benefit; and last, it should comply with annual reporting obligations. That will include keeping financial records of the organization, doing research each year to see if the law has changed, and being vigilant in staying aware of when the filing deadlines are approaching.40

In conclusion, nonprofit organizations and those running them need to pay close attention to the requirements for information reporting. The IRS has made a great effort to provide current and user-friendly information on its website to help both nonprofessionals and professionals, and that should aid people in determining what they have to file and when. The IRS recognizes the unique role nonprofits play in the United States. In July, 2010, in an effort to educate nonprofits about the new filing requirements for Form 990 filers, IRS Commissioner Doug Shulman made these comments about nonprofits:

It’s really important for small charities to pay attention ... These groups do great work in communities across the United States and are vital to the vibrancy of our nation. The last thing we want to do here at the IRS is have these groups lose their tax-exempt status because they haven’t filed a short, simple form. So we urge these small groups to take a minute and make sure they’ve filed.41

Nonprofit organizations are doing good work in their communities and in the state; the IRS has made a genuine effort to help nonprofit organizations continue to function without adverse tax consequences. It is wise to do some work, figure out what specifically your organization needs to do in order to comply, and continue to further the good work the nonprofit organization is doing. Legislation is seemingly always being introduced that has an impact on the taxation of nonprofits – for example, the Affordable Care Act has some tax provisions that apply to Tax-Exempt 501(c) (29) Qualified Nonprofit Health Insurance Issuers, and has added new requirements for tax-exempt hospitals to meet in order to maintain their tax-exempt status.42 As long as they are diligent in keeping on top of new requirements, nonprofits can continue to benefit the communities and states that they serve.

About the Author

Lori A. McMillan is an associate professor of law at Washburn University School of Law. She received a Master of Laws in international taxation from New York University School of Law and is substantially finished with a Doctorate of Jurisprudence in taxation from Osgoode Hall Law School in Toronto.
Before joining the faculty at Washburn University School of Law, McMillan was a visiting professor at Queen's University at Kingston Law School, International Study Centre, where she taught international taxation law. She also taught business law to students at Ryerson University School of Business and was an instructor in the Legal Research and Writing Program at Osgoode Hall Law School. McMillan was an associate lawyer with the Taxation Group of the law firm of Fasken Campbell Godfrey/Fasken Martineau DuMoulin, prior to which she worked as tax counsel to Arthur Andersen & Co. (in both U.S. and Canadian tax law), after starting her legal career at Goodman & Goodman/Goodman Phillips and Vineberg. She has worked extensively in and with foreign legal offices and clients, involved in tax planning for inbound and outbound transactions, both from U.S. and Canadian tax perspectives, as well as from an international and tax treaty standpoint.

ENDNOTES


7. “The amount of the user fee depends on the applying organization’s average annual gross receipts. If the organization’s average annual gross receipts have exceeded or will exceed $10,000 annually over a four-year period, the fee is $850. If gross receipts have not exceeded or will not exceed $10,000 annually over a four-year period, the user fee is $400. An applicant must certify its gross receipts in Part XI.” http://www.irs.gov/charities/article/0,,id=136200,00.html (last updated Aug. 17, 2010).


12. “The exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.”


17. IRS, http://www.stayexempt.irs.gov/virtualworkshop/TaxExemptStatus/becomingpubliccharity/benefits.aspx (last visited Oct. 1, 2010); in order to be a public charity, the organization must demonstrate that it: (1) Receives a substantial part of its support in the form of contributions from publicly supported organizations, governmental units and/or the general public, or (2) normally receives no more than one-third of its support from gross investment income and unrelated business income combined and gets more than one-third of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions. See:http://www.stayexempt.irs.gov/virtualworkshop/TaxExemptStatus/becomingpubliccharity/publiccharity.aspx.


19. The IRS has a list of 15 very narrowly defined classes or types of organizations that do not need to file annually. The only one most people will be concerned with is churches. IRS, http://www.irs.gov/charities/article/0,,id=152729,00.html (updated Sept. 22, 2010); See also Page 9 of http://www.irs.gov/pub/irs-pdf/p557.pdf. (updated June 28, 2010).


(Cont. on next page)
Legal Article: Recent Developments in U.S. Nonprofit...

33. If gross receipts are under a $100,000 the fee is $100. If gross receipts are between $100,001 and $200,000 the fee is $200. If gross receipts are between $200,001 and $499,000 the fee is $500. See IRS, http://www.irs.gov/charities/article/0,,id=221588,00.html (updated May 19, 2010).
36. Form 8868 may only be filed for a single tax return whose due date has not passed, so it does not apply to the Filing Relief Program.
42. IRS, http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6 : “(See Notice 2010-39 and Notice 2011-52.) Form 990, Schedule H, for tax year 2010, was revised to include a new Part V, Section B, to gather information on hospitals’ compliance with the new requirements and on related policies and practices. To give the hospital community time to familiarize itself with the types of information the IRS is requesting, Part V, Section B of Schedule H was made optional for the 2010 tax year (see Announcement 2011-37).”
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IN THE SUPREME COURT OF THE STATE OF KANSAS
RULES RELATING TO JUDICIAL CONDUCT

Rule 640

IMPAIRED JUDGES ASSISTANCE COMMITTEE

Rule 640 is hereby amended, effective July 1, 2012.

(a) Pursuant to Under the authority granted by Article 3, Section 15, of the Constitution of the State of Kansas, and in the exercise of the inherent power of the Supreme Court, there is hereby created an impaired judges assistance committee to provide assistance to any Kansas Judge needing help by reason of a mental or physical disability or an addiction to or excessive use of drugs or intoxicants.

(b) The committee shall consist of seven judges and shall always include at least two active district judges and two active district magistrate judges. The other three members may be active or retired judges. Population and geographical representation shall be considered in the appointment process.

All members shall be appointed to staggered four-year terms; however, initial appointments following this amendment may be for less than four years. The members may be reappointed at the pleasure of the Supreme Court. Each appointment shall be for a term of four years. The Supreme Court will appoint a new member to fill a vacancy on the committee occurring during a term. A new member appointed to fill a vacancy serves the unexpired term of the previous member. No member may serve more than three consecutive four-year terms, except that member initially appointed to serve an unexpired term may serve three consecutive four-year terms thereafter. A vacancy shall occur when the qualifications for the appointment of any member are no longer met.

(c) The Supreme Court shall designate one member as chair of the committee, which shall meet when the need arises and as called by the chair.

(d) The purpose of the committee is to aid Kansas judges who are, or may potentially become, impaired in the performance of their duties by reason of alcohol or substance abuse or other physical or mental infirmity. The objectives of the committee are to:

1. identify judges who are impaired from responsibly performing their duties by virtue of addiction or abuse of alcohol or other chemicals or due to senility, psychiatric disorders or other reasons;

2. arrange intervention in those identified cases in such a manner that the judges involved will recognize their impairment, accept help from the committee and medical professionals, and be treated and monitored for a period of time so that they may return to their duties when able;

3. recommend avenues of treatment and provide a program of peer support where possible;

4. act as an advocate of judges who are ill and assist them in recognizing their impairment in obtaining effective treatment when possible, and in returning to the responsible performance of their profession;

5. educate the public and the legal community about the nature of impairments and develop a program which will generate confidence to warrant early referrals and self-referrals to the committee so that impairments may be avoided, limited or reversed.

(e) A judge may communicate with the committee or one of its members directly on his or her own behalf or any person may suggest the need to intervene on a judge's behalf. The judge's interaction with the committee, however, shall be voluntary. The Office of the Clerk of the Appellate Courts is authorized to assist judges and other persons wishing to contact the Impaired Judges Assistance Committee.

(f) The committee is authorized to designate persons to assist the committee in its work.

(g) The committee members, designees, and all other participants shall be entitled to the immunities of Rule 608 and shall be relieved from the provisions of Rule 8.3 of the Kansas Rules of Professional Conduct, Canon 3D(1) Rule 2.15 (A) and (C) of the Kansas Code of Judicial Conduct, and Rule 207 as to work done for and information obtained in carrying out the work of the committee.

(h) All proceedings, information, meetings, reports, and records of the committee pertaining to individual judges shall be privileged and not be divulged in whole or in part except:
1. when the judge fails or refuses to address the issues of concern, the committee, upon a vote of the majority, may refer the matter to the Commission of Judicial Qualifications;

2. when a judge has been referred to the committee by the Commission on Judicial Qualifications, the committee shall provide progress reports and recommendations to the Commission;

3. when the judge consents to the release of information;

4. or by order of the Supreme Court.

(i) Annually, and at such additional times as the Supreme Court may order, the committee shall file a statistical report of its activities with the Court and the Commission on Judicial Qualifications.

(j) The committee may adopt rules of procedures consistent with this rule.

(k) Members and designees of the committee shall be reimbursed their actual and necessary expenses, including the use of professional intervention assistance, incurred in the discharge of their official duties. Any psychological, medical, or rehabilitative programs undertaken shall not be the financial responsibility of the Impaired Judges Assistance Committee.

(l) A judge’s cooperation, or failure to cooperate, with the committee may be considered by the Commission on Judicial Qualifications and/or the Supreme Court in any disciplinary proceeding.

(m) For purposes of this rule “judge” shall mean any Supreme Court Justice, Court of Appeals Judge, District Judge, District Magistrate Judge, Municipal Court Judge, or any retired judge or justice accepting judicial assignments.

By order of the Court, this 7th day of May, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice
FACTS: This lawsuit arose out of a multimillion-dollar contract awarded in 2009 to Tel-Instrument Electronics Corp. (TIC) by the U.S. Army. The contract related to a high-technology radar-transponder test system. Both TIC and Aeroflex participated in a competitive bid contest that led to the 2009 contract to upgrade the system that had been originally manufactured for the Army by Aeroflex. After six months of review and negotiation, the Army awarded the contract to TIC. Aeroflex filed a protest of the contract award, alleging in part that TIC had stolen its trade secrets. The protest led to an investigation and report by the Army to the Government Accountability Office (GAO) rejecting Aeroflex’s claim and later this lawsuit. In asserting a basis for a Kansas court to exercise personal jurisdiction over the defendants, the verified petition alleged Filardo, a TIC employee and prior employee of Aeroflex is, and at all times material to the lawsuit has been, a Kansas resident. Aeroflex acknowledged that Allen, another prior Aeroflex employee, had been an Arizona resident since 2003, but it alleged his many contacts with Kansas through his employment with Aeroflex were sufficient for the court to have personal jurisdiction over him. After being served with the petition, TIC specially appeared and challenged personal jurisdiction by filing under K.S.A. 2011 Supp. 60-308(b)(1)(B). The Court next addressed the due process concerns of extending personal jurisdiction based on minimum contacts. Court held that if Aeroflex’s allegations are true, TIC sought out Aeroflex’s employees to interfere with TIC’s Kansas competition knowing one of them, Filardo, was a Kansas resident and remained a Kansas resident. It was foreseeable that this alleged purposeful contact by TIC with a Kansas resident and the alleged agreement to use Aeroflex’s trade secrets would cause harm to Aeroflex in Kansas and give rise to TIC being forced to defend itself in a Kansas forum. Under these circumstances, TIC purposefully established minimum contacts with Kansas and invoked the benefits and protections of Kansas law. Court also held extending jurisdiction in this case did not offend the traditional notions of fair play and substantial justice.


EMINENT DOMAIN AND APPEAL
WOODS V. UNIFIED GOVERNMENT OF WYCO/KCK WYANDOTTE DISTRICT COURT – APPEAL DISMISSED

FACTS: In 2009, Unified Government commenced a proceeding to condemn certain real estate, including a tract owned by Woods. On December 21, 2009, Unified Government paid the awards for all of the condemned real estate, and Woods acknowledges that on the following day, December 22, he received notice from Unified Government that his award had been paid into the district court. Woods did not file his notice of appeal of the appraisers’ award on his condemned real estate until January 19, 2010. Unified Government responded with a motion to dismiss Woods’ appeal as untimely. The district court dismissed Woods’ appeal, finding that it was barred because it was filed 48 days after the filing of the appraisers’ report. Woods contends that Unified Government failed to comply with the notice requirements applicable to eminent domain proceedings and, therefore, the district court should have extended the 30-day statutory deadline for appealing the appraisers’ award.

ISSUES: (1) Eminent domain and (2) appeal

HELD: Court held that given that an appeal to the district court from an appraisers’ award in an eminent domain action is nevertheless an appellate proceeding, the district court, like the U.S.
preme Court and Kansas Supreme Court, had no authority to create any equitable exception to the jurisdictional requirement that the notice of appeal be filed within 30 days of the appraisers’ report. Court stated that in other words, the district court had no other choice but to dismiss the untimely-filed appeal. Likewise, Court held it had no choice but to dismiss this appeal because it was powerless to review an issue over which the district court lacked subject matter jurisdiction.

STATUTES: K.S.A. 26-501, -505, -508, -516; and K.S.A. 60-206, -260

INJUNCTION, SMOKING BAN, AND EFFECTIVE DATE DOWNTOWN BAR AND GRILL LLC V. STATE OF KANSAS SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 104,761 – APRIL 6, 2012

FACTS: Downtown Bar is a Class B club in Tonganoxie that acquired its Class B club license on May 4, 2009. Previously it operated as simply a drinking establishment, but as a Class B club it can serve food, drink, and entertainment. Approximately one year after Downtown Bar acquired its Class B license, the 2010 legislature enacted the Kansas Indoor Clean Air Act generally prohibiting smoking in public places and places of employment. But the Act exempts Class B clubs as long as the club (1) was so licensed as of January 1, 2009, and (2) notifies the secretary of the Kansas Department of Health and Environment in writing, not later than 90 days after July 1, 2010, that it wishes to continue to allow smoking on its premises. Because Downtown Bar was licensed simply as a drinking establishment on January 1, 2009 — and not as a Class B club — it is ineligible for a smoking ban exemption under the Act. The 2010 session was not the legislature’s first effort to pass House Bill 2221 for enacting a statewide smoking ban. One year earlier, the 2009 legislature failed to pass this legislation, which included the January 1, 2009, “cut-off” or grandfathering date. Downtown Bar brought a declaratory judgment action asking the trial court to declare that K.S.A. 2010 Supp. 21-4010(d)(8) and (9) violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and § 1 of the Kansas Constitution Bill of Rights and to accordingly issue temporary and permanent injunctive relief. It argued the statute differentiates — without a “rational basis connected to its legislative purpose” — between Class B clubs organized before January 2, 2009, and Class B clubs like itself that organized after January 1, 2009. The trial court agreed, holding that the cut-off date was arbitrary, which therefore meant it could not be rational. It issued a temporary injunction prohibiting the state’s enforcement of the statute.

ISSUES: (1) Injunction, (2) smoking ban, and (3) effective date
HELD: Court held that Class B clubs formed before and after the effective date of the statute were similarly situated. However, the Indoor Clean Act did not implicate a fundamental right and the proper test was a rational basis test. Court held the distinction of clubs before and after the effective date had a rational relationship to the statewide smoking ban. Court stated that if the 2009 legislature conceivably chose the January 1, 2009, date as a cut-off — which would eliminate any incentive to rush to Class B club status during the pendency of the 2009 legislation — then it is exceedingly difficult, if not impossible, to conclude that the 2010 legislature could not conceivably have retained that same cut-off date for the same reason during its own session. Court held the trial court erred in holding that Downtown Bar established a substantial likelihood that it would eventually succeed on the merits of its equal protection claim.

STATUTES: K.S.A. 20-3018; K.S.A. 21-4009, -4010; and K.S.A. 41-2601, -2606


FACTS: One-Call began as a voluntary association of utility companies in 1983. Now, it is a nonprofit corporation that comprises the majority of utility companies in Kansas. Since its creation, One-Call has provided information to its members about future planned excavation activities, and it gives its member utility companies an opportunity to mark the location of their underground facilities before excavation work starts. One-Call makes money by charging a referral fee for alerting its members of a planned dig. In some years, One-Call nets revenue; in others, it incurs a loss. In 1993, the Kansas Legislature adopted One-Call’s business model and enacted the Kansas Underground Utility Damage Prevention Act (KUUDPA). The KUUDPA created a mandatory program designed to protect the state’s underground utility infrastructure from excavation damage and to protect the public from harm. The KUUDPA requires diggers to inform a centralized “notification center” of their intent to dig before they start excavating. The notification center then passes along the dig information to the applicable utility operators. Upon receiving notification of the proposed dig, utility operators are required to mark the locations of underground utilities to avoid accidental utility strikes. In 1993, One-Call began managing and operating the notification center for the state. Utility membership became mandatory. One-Call maintains that it is the notification center while the attorney general argues on behalf of the state that it is simply the entity that runs the notification center. In 2008, the Kansas Legislature amended the KUUDPA. Those amendments are the cause for One-Call’s lawsuit because both One-Call and its utility members will be affected financially by the amendments. One-Call sued to enjoin enforcement of the amendments of House Bill 2637 on the grounds that the amendments violate the original purpose provision from Article 2, § 16 of the Kansas Constitution and the “one-subject” rule. In addition, One-Call contends that the amendments violate the separation of powers doctrine by usurping the power of the Kansas Corporation Commission (KCC); the Equal Protection Clause of the 14th Amendment to the U.S. Constitution by imposing new requirements on the notification center; and the Takings Clause of the Fifth Amendment to the U.S. Constitution by setting limits on the fees that may be charged to water and wastewater utility operators. The trial court granted summary judgment in favor of the state.

ISSUES: (1) KUUDPA, (2) separation of powers, (3) equal protection, and (4) takings clause
HELD: Court stated that to violate the single subject rule, a bill must have two dissimilar subjects that have no legitimate connection with each other. Here, there is a legitimate connection because KORA and KOMA are related to KUUDPA, which is related to utilities in general, and we have held that Article 2, § 16 should be “liberally construed.” Moreover, Court has declared that a statute is legitimate under that provision unless “invalidity is manifest.” While the Kansas Legislature cannot disobey constitutional limitations in the enactment of laws, there is a strong presumption in favor of the validity of any bill passed by the legislature. Court rejected One-Call’s contention that House Bill 2637 contained two subjects. As a result, Court determined that the 2008 amendments to KUUDPA did not violate the one-subject rule. Court rejected One-Call’s argument that the 2008 amendments to KUUDPA violated the separation of powers doctrine because that legislation was adopted after the Kansas Legislature had delegated legislative
Appellate Decisions

authority to the KCC under the 2006 amendments. Court stated that the only added power the KCC received from the legislature in 2006 was the power to adopt rules and regulations to carry out KUUDPA, which it was allowed to do when the KUUDPA was created in 1993. Court held that the trial court correctly concluded that One-Call is an entity distinct from the notification center. Court rejected One-Call’s claim that it was being treated differently from every other private not-for-profit corporation in Kansas. Court stated that the legislature has the authority to write into law differences that exist in those areas in which public power is exerted, thus One-Call’s equal protection claim failed. Court denied One-Call’s takings claim. Court stated that whenever One-Call’s expenses exceed revenues, it can increase fees to cover those increased costs. Under the amendments, any increased costs may be passed along to Tier 1 utilities and, in part, to Tier 2 utilities, whose rates are capped at 50 percent of Tier 1 utilities. Thus, One-Call retains the ability to pass through costs and has not been deprived of any money. For that reason, no taking has occurred as a result of the amendments.

STATUTES: K.S.A. 45-217; K.S.A. 66-101b, -1801, -1802, -1803, -1805, -1806, -1813, -1814, -1815; and K.S.A. 75-4318

CRIMINAL

STATE V. ADAMS

COMANCHE DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, REMANDED

COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART

NO. 101,392 – APRIL 6, 2012

FACTS: Adams arrested in investigation that began with traffic stop of Adams’ housemate, and discovery of drug evidence in execution of search warrant at their house. Adams convicted of six counts relating to conspiracy to manufacture methamphetamine and possession of methamphetamine. Court of appeals affirmed. 43 Kan. App. 2d 842 (2010). Review granted on: (1) error to deny motion to suppress when officer’s affidavit for warrant misrepresented his training and experience and knowledge of drug production; (2) jury improperly instructed regarding testimony about prior drug use; (3) error to use Adams’ criminal history to enhance sentence; and (4) under identical offense sentencing doctrine, court erred in classifying offense of possession of lithium metal with intent to manufacture a controlled substance, K.S.A. 2007 Supp. 65-7006(a), as a severity level 2 drug felony.

ISSUES: (1) Motion to suppress, (2) jury instructions regarding prior drug use, (3) Apprendi/Ivory issue, and (4) identical offense sentencing doctrine

HELD: Portions of affidavit that were not challenged established probable cause, thus no need for Franks hearing. No error in denying Adams’ motion to suppress. Under facts, magistrate had substantial basis to determine there was probable cause that methamphetamine was being manufactured at the house.

No error to use PIK Crim 3d 67.13-D to inform jury that a defendant’s use of drugs is a factor jury may consider in determining whether the defendant knowingly possessed a controlled substance when evidence at trial is limited to defendant’s use of controlled substances on the same occasion as the one when the drugs were allegedly possessed by the defendant.

Court adheres to holding in Ivory. Use of prior convictions for sentencing enhancements is constitutional.


STATUTES: K.S.A. 2010 Supp. 60-455; K.S.A. 2007 Supp. 65-4101(e), -4107(d)(3), -4150(c), -4152(a)(2), -4152(a)(3), -4159(a), -4160(a), -7006(a), -7006(f); K.S.A. 20-3018(b); K.S.A. 21-3301, -3302(a), -4721(e)(3); K.S.A. 22-3413(3), -3602(e); and K.S.A. 60-455

STATE V. BERRETH

BUTLER DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – REVERSED

NO. 99,937 – APRIL 6, 2012

FACTS: Ten years after conviction and sentence for aggravated kidnapping and aggravated criminal sodomy with a child, Berreth filed motion to correct an illegal sentence, K.S.A. 22-3504. Appointed counsel later filed motions citing K.S.A. 60-1507. All motions argued multiplicity. District court found the aggravated kidnapping conviction was multiplicitous with the aggravated criminal sodomy conviction, reduced the aggravated kidnapping conviction to kidnapping, and thus reduced Berreth’s sentence. State appealed on question reserved. In unpublished opinion (Berreth I), Court of Appeals reversed and ordered reinstatement of original sentence. After district court complied, Berreth appealed. Court of Appeals affirmed in unpublished opinion (Berreth II). Berreth’s petition for review granted to reexamine jurisdictional basis for state’s appeal, and correctness of Court of Appeals’ rulings.

ISSUES: (1) Appellate jurisdiction and (2) appeal on question reserved

HELD: Only statutory jurisdictional basis asserted by state for appeal of order reducing Berreth’s conviction for aggravated kidnapping to simple kidnapping was K.S.A. 22-3602(b)(3), a question reserved. As issue of first impression, state cannot change or expand its elected statutory basis for appellate jurisdiction – at least without notification, if not formal amendment. While appellate courts have duty to question jurisdiction on their own initiative, under facts of this case the Court of Appeals could not sua sponte alter state’s election of a statutory basis for appellate jurisdiction. Court of Appeals failed to properly treat state’s appeal as a question reserved as state had elected. Reversed and remanded for reinstatement of Berreth’s reduced sentence.

Appellate courts do not answer questions reserved unless matter is of statewide importance. Here, state’s appeal did not qualify as a question reserved because question was resolved by State v. Schoonover, 281 Kan. 453 (2006), thus state’s appeal could have been simply dismissed. Also, clarifying Kansas caselaw, an appellate court’s answer to a state’s question reserved has no effect on the criminal defendant in the underlying case.

DISSENT (Luckert, J., joined by Rosen, J.): There is no constitutional or statutory basis for requirement that a notice of appeal include citation to statute for appellate jurisdiction. Would hold that state elected and sufficiently announced jurisdictional basis for relief it sought by clearly requesting relief under K.S.A. 60-1507 in its initial brief to Court of Appeals in Berreth I. Two divergent lines of cases and Supreme Court Rule 2.01 are examined. State v. Verge, 272 Kan. 501 (2001), and State v. G.W.A., 258 Kan. 703 (1995), are criticized.

STATUTES: K.S.A. 20-3018, -3018(a); K.S.A. 22-3504, -3504(1), -3601(a), -3601(b)(1), -3602, -3602(b)(1), -3602(b)(3), -3603, -3606; and K.S.A. 60-1507, -1507(d), -1507(f), -2101(a), -2101(b), -2102, -2102(a), -2103(b)

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STATE V. COMAN
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 100,494 – MARCH 30, 2012

FACTS: Coman pled guilty to misdemeanor criminal sodomy, K.S.A. 21-3505(a)(1), based on incident with a dog. District court ordered Coman to register under Kansas Offender Registration Act (KORA), pursuant to catch-all provision K.S.A. 22-490(c)(14), requiring registration for those committing sexually motivated acts. Coman appealed. Court of Appeals declined to consider constitutional challenge to K.S.A. 21-3505(a)(1) raised for first time on appeal because Coman did not appeal his conviction, entered a guilty plea, and filed no motion to withdraw his plea at trial. Divided panel affirmed district court’s registration order. 42 Kan. App. 2d 592 (2009). Review granted.

ISSUES: (1) Constitutionality of criminal sodomy statute and (2) KORA registration for misdemeanor criminal sodomy

HELD: Appeal Court of Appeals appropriately declined to consider Coman’s first-time-on-appeal challenge to constitutionality of K.S.A. 21-3505(A)(1) as applied to bestiality charges against him.

Provisions in K.S.A. 22-4902 interpreted to determine whether Coman fits within statutory definition of “offender” required to register under KORA. A person who commits misdemeanor criminal sodomy, as defined in K.S.A. 21-3505(a)(1), is not required to register as a sex offender under K.S.A. 22-4902(c)(4) or (c)(14). Rather, provisions of K.S.A. 22-4902(a)(5)(B) govern when a person who has violated K.S.A. 21-3505(a)(1) must register under KORA. Here, Coman was not required to register, and district court erred in so ordering. District court and Court of Appeals are reversed.

STATUTES: K.S.A. 21-3501(1), -3501(2), -3505, -3505(a)(1), -3505(a)(2), -3505(a)(3); K.S.A. 22-4901 et seq., -4902, -4902(a) (2), -4902(a)(5), -4902(a)(5)(B), -4902(c), -4902(c)(4), -4902(c)(14), -4904; and K.S.A. 60-2103(b)

STATE V. HERNANDEZ
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 101,719 – APRIL 12, 2012

FACTS: On October 9, 2007, Hernandez pleaded guilty to aggravated sexual battery in case No. 07CR2807. The charge was based on events occurring September 8, 2007, with L.M.C., a 17-year-old female. Hernandez was released on bond pending sentencing. On December 15, 2007, while on bond and awaiting sentencing in 07CR2807, Hernandez called a friend and slept on the couch. He got into bed naked with his friend’s 11-year-old daughter. The state charged Hernandez with one count of aggravated indecent liberties with a child. Over Hernandez’ objection at trial, the jury was instructed on both aggravated indecent liberties and the lesser-included offense of attempted aggravated indecent liberties. On separate pages of the verdict form, the jury returned guilty verdicts on both charges. Hernandez moved for a mistrial, claiming that there was a fundamental error in the jury verdicts. In response, the state likened the situation to one where a defendant is charged with alternative counts and the jury convicts on both alternative counts. The court denied Hernandez’ motion for mistrial and set the matter for further argument at sentencing. At sentencing, the court denied Hernandez’ motions for new trial, judgment of acquittal, and sentence departure, and imposed a life sentence on the aggravated indecent liberties with a child conviction in case No. 07CR3805. The court also imposed the presumptive sentence of 32 months for the aggravated sexual battery in case No. 07CR2807, to be served consecutive to the life sentence.

ISSUES: (1) Inconsistent verdicts and (2) age element of Jessica’s Law

HELD: Court held that a mistrial was appropriate because the verdicts were legally and factually inconsistent. The trial court could not legally enter judgment on either verdict because the jury’s finding on the other verdict precluded such judgment. Aggravated in-

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

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demonstrated Portillo’s defense in any way. Accordingly, the district court agreed with the state’s argument that its charging error and that the erroneous charging instrument had not prejudiced the district court’s consideration of Hernandez’ age being 18 or older is an essential element of the off-grid version of the crime. The information did not contain that essential element. That omission rendered the information fatally defective and deprived the trial court of jurisdiction to convict Portillo of the off-grid version of rape. The district court’s sentence, based upon a conviction for the off-grid person felony, was vacated. However, Court held Portillo did not challenge the validity of the information with respect to the on-grid, severity level 1, person felony version of rape. Accordingly, Court remanded for resentencing based upon the appropriate grid-box for the severity level 1 person felony.

STATE V. PORTILLO

WYANDOTTE DISTRICT COURT – CONVICTIONS AFFIRMED, AND SENTENCE VACATED AND REMANDED FOR RESENTENCING

NO. 102,558 – APRIL 27, 2012

FACTS: Portillo was accused of the forcible rape of D.B., the daughter of a woman with whom Portillo had been having an affair. D.B. told authorities that Portillo “tried to put his thing in her.” When asked whether Portillo had “put it in all the way,” D.B. responded, “Yes, but not all the way in.” D.B.’s mother opened the bedroom door to discover Portillo on top of D.B. and D.B.’s underwear and pants below her knees. The mother scuffled with Portillo, before calling the police. After the police interviewed D.B., her mother took her to the hospital emergency room. The sexual assault examination revealed no tearing, lacerations, or scratches with the naked eye, but the doctor did notice a “duskiness in the posterior fourchette,” which was consistent with bruising as a result of direct blunt trauma. The swabs collected from D.B. during the examination and from D.B.’s bedding all tested negative for Portillo’s DNA. D.B. was forensically interviewed at the Sunflower House the day after the incident. Portillo’s theory of defense was that D.B.’s mother had fabricated the rape because she was mad at Portillo for refusing to commit to their relationship. At trial, the defense objected to the admission of the videotape of D.B.’s Sunflower House interview as cumulative, arguing that it constituted the “fourth hearsay telling of what [D.B.] has said.” The trial court admitted the videotape as being probative of the victim’s state of mind. The jury was instructed on both rape and attempted rape. The jury found Portillo guilty on the rape charge. The state discovered at the initial sentencing hearing that the information had charged Portillo with severity level 1 rape, rather than the off-grid version. Apparently, the district court continued the initial sentencing hearing to allow the parties to brief the issue. Ultimately, the district court agreed with the state’s argument that its charging of the on-grid version of the offense could be considered a clerical error and that the erroneous charging instrument had not prejudiced Portillo’s defense in any way. Accordingly, the district court determined that it could sentence Portillo for the off-grid version of the crime. However, the district court advised the parties that it had decided sua sponte to impose a departure sentence. The aggravated term in the appropriate guidelines grid-box for the severity level 1 version of rape was 165 months. The district court told the parties that it was “looking at a number between 165 [months] and 25 years.” After giving the parties an opportunity to be heard, the court ultimately imposed a sentence of 240 months.

ISSUES: (1) Charging of crime, (2) admission of videotape evidence, (3) sufficiency of the evidence, and (4) sentencing

HELD: Court held that without reweighing the evidence or reassessing the victim’s credibility, and viewing the evidence in a light most favorable to the state, it was constrained to find that a rational jury could have found beyond a reasonable doubt that Portillo completed the crime of rape by effecting penile penetration. In other words, the evidence was sufficient to support the rape conviction. Court found no abuse of discretion in admitting the videotape of D.B.’s sexual abuse interview at the Sunflower House and rejected Portillo’s argument that it was cumulative hearsay evidence and prejudicial. Last, Court found the state conceded that its information did not charge Portillo with the off-grid version of rape. Court held the defendant’s age being 18 or older is an essential element of the off-grid version of the crime. The information did not contain that essential element. That omission rendered the information fatally defective and deprived the trial court of jurisdiction to convict Portillo of the off-grid version of rape. The district court’s sentence, based upon a conviction for the off-grid person felony, was vacated. However, Court held Portillo did not challenge the validity of the information with respect to the on-grid, severity level 1, person felony version of rape. Accordingly, Court remanded for resentencing based upon the appropriate grid-box for the severity level 1 person felony.

STATE V. SNELLINGS

RENO DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, REMANDED

COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART

NO. 101,378 – APRIL 6, 2012

FACTS: Snellings convicted of drug related offenses. In unpublished opinion, Court of Appeals affirmed in part, reversed in part, and remanded for resentencing. Snellings filed petition for review on three sentencing issues. First, that identical offense sentencing doctrine required his conviction for possession of ephedrine or pseudoephedrine with intent to manufacture a controlled substance as defined in K.S.A. 2007 65-7006(a), a severity level 2 drug felony, to be classified as possession of drug paraphernalia with intent to manufacture a controlled substance containing ephedrine or pseudoephedrine as defined in K.S.A. 2007 Supp. 65-4252(a)(3), a severity level 4 drug felony. Second, that his conviction for manufacturing methamphetamine as defined in K.S.A. 2007 Supp. 65-4159(a), a severity level 1 drug felony, must be classified as a class A misdemeanor because elements identical to compounding a controlled substance containing ephedrine or pseudoephedrine as defined in K.S.A. 65-4164(a), a class A nonperson misdemeanor. Third, that district court’s consideration of Snellings’ prior conviction in sentencing violated Apprendi.

ISSUES: (1) Possession of ephedrine or pseudoephedrine, (2) manufacture of methamphetamine, and (3) Apprendi/Ivory issue

HELD: Identical offense sentencing doctrine discussed and applied, finding possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine under K.S.A. 2007 Supp. 65-7006(a) is identical to offense of possession of drug paraphernalia with intent to manufacture a controlled substance under K.S.A. 2007 Supp. 65-4159(a). Snellings’ sentence as a severity level 2 drug felony is vacated. Remanded for resentencing.
Under principles governing identical offense sentencing doctrine, elements of manufacturing methamphetamine as defined in K.S.A. 2007 Supp. 65-4159(a) are not identical to elements of compounding a controlled substance containing ephedrine or pseudoephedrine as defined in K.S.A. 65-4164(a). Sentencing as severity level 1 drug felony is affirmed.

Court adheres to holding in Ivory that use of prior convictions for sentencing enhancements is constitutional.

STATUTES: K.S.A. 2007 Supp. 65-4101(e), -4101(n), -4113, -4150(a), -4150(c), -4152(a)(3), -4159, -4159(a), -4159(b), -4164(a), -7006(a), -7006(f); K.S.A. 2006 Supp. 21-4717(a)(1) (D), 65-4150(c); K.S.A. 20-3018(b); K.S.A. 21-3302(a), -4717, -4717(a)(1)(D), -4721(c)(3); K.S.A. 22-3210(a)(4), -3602(e); and K.S.A. 65-4101 et seq., -4105, -4107, -4109, -4111, -4107(d), -4107(d)(3), -4150(c), -4152, -4152(a)(3), -4159, -4159(a), -4161(a), -4164, -4164(a), -7003(l)(17), -7006, -7006(a)

**STATE V. TORRES**

**SEDGWICK DISTRICT COURT – REVERSED AND REMANDED**

**NO. 101,285 – APRIL 6, 2012**

FACTS: Torres convicted of rape of 11-year-old daughter of woman who lived with Torres. Torres appealed, claiming district court erred in allowing state to present plan evidence of Torres’ conviction nearly two decades earlier for indecent liberties against a child. Torres also claimed reversible error in district court giving Allen-type instruction, and giving insufficient jury unanimity instruction.

ISSUES: (1) Evidence of prior conviction and (2) jury instructions

HELD: On facts of case, district court’s admission of evidence that Torres had committed offense of indecent liberties against a child many years before the crime charged here was improper because there were insufficient similarities between the two events. Error was not harmless in this case. New trial is ordered, with jury instruction issues addressed to assist retrial.

District court’s Allen instruction was error, but not clear error under facts. District court’s compliance with State v. Washington, 293 Kan. 732 (2012), and State v. Salts, 288 Kan. 263 (2009), is presumed on retrial. On facts of this multiple-acts case, district court’s unanimity instruction properly told jury that is members must all agree on the specific criminal act to convict. Specific modification to pattern unanimity instruction is suggested as better practice.

STATUTES: K.S.A. 2006 Supp. 21-4642; and K.S.A. 60-261, -455

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FACTS: M.S., who is married to A.S., filed a petition to adopt her children, C.A.T., B.T.M., and E.A.K.M. The adoption of C.A.T., who has a different father from his siblings, was not challenged at the district court level and is not at issue in this case. But J.R., the natural father of B.T.M. and E.A.K.M., asserted his parental rights and refused to consent to their adoption. A.S. claimed she was raped by J.R. during the conception of both B.T.M. and E.A.K.M. After holding an evidentiary hearing, the district court terminated J.R.’s parental rights under K.S.A. 2010 Supp. 59-2136 – which permits termination of a father’s parental rights if a child is conceived as a result of rape – and granted the adoption.

ISSUES: (1) Adoption, (2) rape, and (3) termination of parental rights

HELD: Court stated under K.S.A. 59-2136 the district court can consider the best interests of the child as a factor in determining whether to terminate parental rights. Court held that viewing the evidence in the record in the light most favorable to M.S. as the prevailing party, Court found that a reasonable factfinder could conclude that it was highly probable that the termination of J.R.’s parental rights and the adoption were in the best interests of both B.T.M. and E.A.K.M. Thus, the district court did not commit error. Court also stated the district court found that the adoption was in the best interest of both children because M.S. had stable employment, had a good relationship with the children for several years, and that J.R. had not been fulfilling the duties of a parent. Moreover, the district court considered evidence that J.R. had not protected B.T.M. from cigarette smoke, had raped his mother during a parenting time visit, and had failed to contact either child for approximately three years. Court held that each of these findings was supported by substantial evidence in the record.

DISSENT: Judge Green dissented and would hold that the trial court improperly granted the adoption of B.T.M. without J.R.’s consent to the adoption because the facts established in the case raised only the mere possibility that A.S. had been raped in the way the trial court had held.

STATUTES: K.S.A. 21-3502; K.S.A. 38-1114; and K.S.A. 59-2136

CHILD IN NEED OF CARE AND PLACEMENT ORDER

IN RE C.E.

BUTLER DISTRICT COURT – APPEAL DISMISSED

NO. 105,585 – APRIL 27, 2012

FACTS: C.E. was declared a child in need of care (CINC) under the Revised Kansas Code for Care of Children and placed in a secure care facility. Therefore, SRS contended that it was not required to pay the costs of C.E.’s detention. The district court denied SRS’ appeal for lack of jurisdiction.

ISSUES: (1) Child in need of care and (2) placement order

HELD: Court held that under the facts of this case, SRS does not have standing to bring an appeal under K.S.A. 2010 Supp. 38-2273, because it is neither a party nor an interested party as those terms are defined in the Revised Kansas Code for Care of Children (Code). Court held that even if SRS was considered an interested party, the court still did not have jurisdiction because a placement order is not an appealable order under the Code.

STATUTES: K.S.A. 38-1681, -2201, -2202, -2203, -2214, -2233, -2242, -2243, -2251, -2253, -2255, -2256, -2260, -2266, -2269, -2273; and K.S.A. 60-801

INSURANCE, APPLICATION, AND DISCLOSURE

GOLDEN RULE INSURANCE CO. V. TOMLINSON AND KANSAS INSURANCE DEPARTMENT

SHAWNEE DISTRICT COURT – REVERSED

NO. 105,245 – APRIL 27, 2012

FACTS: Denney and her husband began looking for affordable insurance coverage. They spoke with Dirk McClary who was af-
filiated with Design Benefits. McClary was also affiliated with USA Benefits Group, which changed its name to America's Health Care Plan, a brokerage firm located in Illinois that is licensed in Kansas and markets insurance products of Golden Rule. McClary was not a captive agent of Golden Rule; that is, he was not an employee of Golden Rule soliciting business solely for that company. McClary referred to himself as an agent rather than a broker. Denney told McClary about her lengthy medical history. McClary submitted Denny's applications to Golden Rule. However, McClary submitted applications that did not disclose Denney's preexisting medical condition. Denney did not review the application before its submission. Golden Rule issued a policy covering Denney and her family members and Denney cancelled her other insurance. Doctors requested approval for surgery for Denny and it turned into an investigation of Denney's medical records and disclosures in her insurance applications. Golden Rule said that if the disclosures were made it would have required riders excluding coverage for her specific preexisting conditions. Denney filed a complaint with the Kansas Insurance Department. The Department issued an ex parte emergency order finding that Golden Rule had committed unfair claim settlement practices in the business of insurance. The emergency order stated that Golden Rule had wrongfully denied Denney coverage for a medically necessary procedure and ordered Golden Rule to pay Denney's claim. In an appeal to the Insurance Commissioner, it found that Golden Rule should pay for the reconstructive surgery as well as for Denney's future medical services.

**ISSUES:** (1) Insurance, (2) application, and (3) disclosure

**HELD:** Court held that under the facts presented, the insurance agent was acting as agent for the proposed insured in submitting an application for insurance to the proposed insurer. Court held that McClary was acting as an independent broker and, in this transaction, was the agent of Denney, not the agent of Golden Rule. Thus, Golden Rule was not responsible for McClary's acts and omissions. Upon learning that Denney's health information was not accurately represented on the application submitted by her agent, Golden Rule initiated a prompt and reasonable investigation. Court concluded that Golden Rule did not engage in unfair claim settlement practices by refusing to pay Denney's claim without conducting a reasonable investigation and by failing to make a good-faith effort to effectuate a prompt, fair, and equitable settlement of Denney's claim after liability became reasonably clear. Court also held that in failing to accurately report Denney's medical history, we have determined that McClary was acting as Denney's agent at the time. Thus, Golden Rule was entitled to exclude coverage for Denney's anticipated surgery, and the issue whether Golden Rule should have predetermined that Denney had coverage becomes moot.

**STATUTES:** K.S.A. 40-2401, -2403, -2404, -2407, -4901, -4902, -4905; and K.S.A. 77-529, -601, -621

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**ISSUES:** (1) Noise ordinance and (2) nuisance

**HELD:** Court held that under the facts of this case, the inclusion of the word "unreasonable" in the city's ordinance does not cure its vagueness. Even if the city is correct that its ordinance is distinguishable because of the inclusion of "unreasonable" in describing the quality of noise, the critical piece of the city's ordinance is still the fact that it only applies when the noise "either annoys, disrupts, injures or endangers" the comfort, repose, health, peace, or safety of others within the city. There is no objective standard by which to judge whether the complainants have reasonable grounds to complain about the noise either annoying, disrupting, injuring, or endangering them. Court also held there is no reason that the City cannot enact a more specific ordinance to proscribe the objectionable conduct involving dust and industrial noise and provide constitutionally acceptable objective standards for consideration of the conduct. Court stated that it realized that small farm towns depend on the agricultural economy for their survival and vice versa – as seen by the many briefs filed by amicus curiae. However, "[s]idewalks and tree branches are at least as common in East Windsor as pigeons are in Atlantic City." 363 N.J. Super. at 484, as dust and industrial noise are in small rural farm towns. If dust and industrial noise present a public nuisance, then it lies within the power of the city to enact an ordinance specifically prohibiting such nuisance and defining objective standards to give anyone subject to its criminal penalties fair warning for what conduct will be prosecuted.

**STATUTES:** K.S.A. 8-1557; and K.S.A. 21-3209, -3211, -3212, -3215, -3608(1)(b), -3901, -4107

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**NOISE ORDINANCE AND NUISANCE CITY OF LINCOLN CENTER V. FARMWAY CO-OP INC. ET AL. LINCOLN DISTRICT COURT – AFFIRMED NO. 105,962 – APRIL 12, 2012**

**FACTS:** Farmway owns and operates a grain elevator located within the city of Lincoln Center. Farmway constructed an addition to the grain elevator which was surrounded by houses in the small rural farming community. Residents complained about increased noise levels from the aeration drying fans and the increased grain dust and truck dust in the air. The city charged Farmway with violating the city’s ordinances regarding excessive loud noises and nuisances. After a full trial, the municipal court found Farmway guilty on both counts and ordered it to pay fines. Farmway appealed and the district court granted Farmway's motion to dismiss, finding the ordinances were unconstitutionally vague.

**ISSUES:** (1) Noise ordinance and (2) nuisance

**HELD:** Court held that under the facts presented, California resident plaintiffs who commenced a California suit using a California
lawyer against a Kansas corporation and who perfected service of process by personal service in Kansas have not purposely availed themselves of the laws of Kansas so as to support long-arm jurisdiction over them when the Kansas corporation later sues the California plaintiffs and their California lawyer for malicious prosecution in order to recover attorney fees the Kansas corporation incurred in successfully defending in the California suit.

STATUTE: K.S.A. 60-308

PROBATE, DISCOVERED WILL, AND INNOCENT BENEFICIARY IN RE ESTATE OF STRADER MARSHALL DISTRICT COURT – AFFIRMED NO. 105,964 – APRIL 20, 2012

FACTS: On October 19, 2006, Betty Jo Strader died in Blue Rapids, Marshall County, Kansas. She was predeceased by her husband, Gerald Strader, and survived by five adult children: Roger Strader, Alan Strader, Janet Pralle, Eric Strader, and Regina Crowell. In December 2006, Eric filed a petition for letters of administration through his attorney, Darrell Spain. On February 2, 2007, the district court found that Betty had died intestate on October 19, 2006, and appointed Jerry Weis administrator of her estate. Betty's estate was worth $1,348,146.62 at final valuation, including $898,900 in real estate and $160,572.63 in personal property. On February 22, 2011, Jason Brinegar, of Galloway Wiegers & Brinegar P.A. (law firm), notified the court that Betty's will had been found at his Marysville law office “[d]uring a recent review of old files and general housekeeping.” That same day, Eric filed a petition for probate of the will under K.S.A 59-618 and petitioned for a stay of the property auctions. Roger and Regina filed a brief in support of Eric's petitions for probate and stay, whereas Janet filed a petition to deny admission of the will to probate under K.S.A. 59-617. At the evidentiary hearing on March 21, 2011, the district court took judicial notice of the original wills of both Betty and Gerald. Gerald's will had been admitted to probate years earlier. After hearing all the evidence, the district court admitted Betty's will to probate. The court also made an express finding that no one knowingly withheld Betty's will from probate. Janet argues that the district court erred in admitting Betty's will to probate. Specifically, she argues that a will offered for probate more than six months after the testator's death can only be admitted if knowingly withheld from probate. Eric, Roger, and Regina contend that any innocent beneficiary can use K.S.A. 59-618's savings provision. O'Keefe, the administrator of Betty's estate, agrees with Eric, Roger, and Regina.

ISSUES: (1) Probate, (2) discovered will, and (3) innocent beneficiary

HELD: Court acknowledged that K.S.A. 59-618 could well be interpreted as is desired by Janet, but the court relied on the language of the statute that, “Such will may be admitted to probate as to any innocent beneficiary on petition for probate by any such beneficiary, if such petition is filed with 90 days after such beneficiary has knowledge of such will and access to it ....” The language of that portion of the statute appears to pursue the goal of protecting all valid wills if possible. The court concluded that as far as any innocent beneficiary is concerned, the knowing withholding of a will, or the misplacing of the will, have the same result in that the beneficiary's rights under the will are defeated. Allowing late filing for either reason is logical and does not absolutely depart from the language of the relevant statute.

DISSENT: Chief Judge Greene dissented arguing the majority did not properly construe the statutes in question and did not honor the clear legislative policy regarding the statutory time bar for the petition of wills.

STATUTE: K.S.A. 59-617, -618

PROTECTION FOR ABUSE ORDER AND EXTENSION JORDAN V. JORDAN BUTLER DISTRICT COURT – AFFIRMED NO. 105,460 – APRIL 12, 2012

FACTS: Shannon Jordan filed a petition for a Protection From Abuse (PFA) order against her estranged husband, Roy Jordan. In the petition, Shannon claimed that Roy had abused her throughout their marriage and that a domestic violence charge was pending against him for an altercation in which he tried to harm her with a machete. The petition also cited a previous domestic violence conviction against Roy. The petition requested protection for Shannon and Shannon and Roy's five children. An evidentiary hearing on the petition was conducted on November 16, 2009, and that same day the district court granted the PFA order. The order was granted only as to Shannon. On November 10, 2010, Shannon filed a motion to extend the PFA order. The parties were engaged in divorce proceedings at the time the PFA order was put in place and when Shannon sought an extension of it. K.S.A. 2010 Supp. 60-3107(e) states that a PFA order already in place “may” be extended for an additional
year on motion from the plaintiff. After an evidentiary hearing, the district court granted the one-year extension.

ISSUES: (1) Protection from abuse order and (2) extension

HELD: Court held that the district court did not abuse its discretion in extending the PFA order for an additional year. Court rejected Roy’s claim that the district court inappropriately based its decision on the subjective fear that Shannon had of Roy. PFA orders are by their nature subjective judgments, and the district court is in the best position to know when they are warranted. Court stated that the district court was in the best position to know whether an extension was necessary. The district judge that extended the PFA order was the same judge that originally issued the PFA order. In the order extending the PFA order, the district court noted that the divorce case between Roy and Shannon “ha[d] been quite contentious” and that “the continuation of the current PFA for an additional year should serve to help maintain the peace between these parties.”

STATUTES: K.S.A. 44-532(d); K.S.A. 59-29a08(a); K.S.A. 60-242(a), -3107(e); and K.S.A. 79-3268(f)

REAL PROPERTY AND EASEMENT
MCCOY V. BARR ET AL.
GREENWOOD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,362 – APRIL 6, 2012

FACTS: This dispute concerns the various parties’ rights and duties relating to a certain piece of landlocked real property (Reserved Property) and the property that surrounds it (Surrounding Property), located in Greenwood County. The cemetery on the Reserved Property contains 16 visible headstones with as many as 30 people buried therein. The 2-acre Reserved Property has never been subdivided or subjected to any official survey filed of record. Only a portion of the Reserved Property is actually used for gravesites, and the remainder of the property has been used for farming or pasture over the years. There is no road or recognized path leading to the Reserved Property, and it is inaccessible except by crossing the Surrounding Property. A railroad right-of-way runs adjacent to the Reserved Property, but the record does not reflect to what extent the parties can gain access to the Reserved Property by using the railroad right-of-way. In 1908, the Surrounding Property was conveyed by John T. Gage to non-Gage family members. Barr acquired title to the Surrounding Property by deed on December 26, 1973. A tax foreclosure sale was held on June 2, 2005, at which Stephen McCoy purchased the Reserved Property for $2,300. McCoy later stated that he purchased the Reserved Property for his leisure activity and for hunting. McCoy was aware that the Reserved Property was landlocked but assumed he could gain access by using the now-abandoned railroad right-of-way bounding one edge of the Reserved Property. After the sheriff’s sale, McCoy attempted to negotiate with Barr for an easement across the Surrounding Property to access the Reserved Property, but he was unsuccessful in doing so. On October 27, 2005, McCoy filed suit against Barr, contending that he was entitled to an easement across the Surrounding Property. The district court granted summary judgment to McCoy and the county giving an easement across Barr’s property to the cemetery for the purpose of access by county employees and for public visitation.

ISSUES: (1) Real property and (2) easement

HELD: Court concluded the district court did not err in determining that an access easement existed across Barr’s property and that the easement has not been abandoned by nonuse. However, Court concluded the district court erred by granting summary judgment in favor of the county as to the scope of the easement and remanded for an evidentiary hearing to resolve issues as to the physical scope of the easement, and the right to public access to the cemetery. In determining the proper scope of the easement, the district court should consider the intent that may be inferred from the actual use of the dominant tenement at the time of the creation of the easement as well as any uses that the facts and circumstances show were in reasonable contemplation of the parties at that time.

STATUTE: K.S.A. 17-1305

SERVICE OF PROCESS
FIRST MANAGEMENT INC. V. TOPEKA INVESTMENT GROUP LLC
SHAWNEE DISTRICT COURT – AFFIRMED

FACTS: First Management substantially completed plumbing-related work at a Holiday Inn Express for Topeka Investment on June 14, 2010. On September 23, 2010, First Management demanded payment from Topeka Investment. Topeka Investment then requested some minor “punch list” work. First Management completed the “punch list” work and again demanded payment on October 13, 2010. Topeka Investment refused to pay First Management. On December 6, 2010, First Management filed a petition against Topeka Investment for $22,583.67 together with pre- and postjudgment interest, costs; and for such further additional relief as the Court deems just and proper,” claiming unjust enrichment and promissory estoppel. A process server appointed by the district court served the desk clerk, Pietri, at the Holiday Inn Express with the summons and petition on December 11, 2010. Topeka Investment did not file an answer to the petition, and on January 7, 2011, First Management filed a motion for default judgment. A copy of the motion was mailed to Topeka Investment’s registered agent, Madan Rattan, at the Holiday Inn Express address of 601 NW Highway 24, Topeka, Kansas, 66608. On February 9, 2011, the district court granted judgment to First Management for the principal amount requested of $22,583.67, plus $319.38 prejudgment interest. On March 15, 2011, Topeka Investment filed a motion to set aside the judgment, claiming that the service of process was not proper, and thus, the district court did not have jurisdiction to enter a judgment against it. The district court denied the motion, determining that service was proper.

ISSUE: Service of process

HELD: Court held that when an employee of a limited liability company is in charge of one of its business offices at the time of the service of process, even if not an officer of that company, personal service on that employee is effective under K.S.A. 2010 Supp. 60-304(e); therefore, service on Topeka Investment was effective by serving Pietri at the Holiday Inn. Court also held that even if Topeka Investment was able to prove by clear and convincing evidence that its failure to respond was based on excusable neglect, it has not set forth any factual basis regarding no prejudice to the other party and that it had a meritorious defense. Court stated that Topeka Investment alleged at oral argument that it claimed a meritorious defense to the lawsuit in its motion to set aside the default judgment, claiming that the service of process was not proper, and thus, the district court did not have jurisdiction to enter a judgment against it. The district court denied the motion, determining that service was proper.

STATE: K.S.A. 2010 Supp. 60-255(h), -304(e)

SEXUAL OFFENDER RELEASE AND HEARING IN RE CARE AND TREATMENT OF MILES
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 105,344 – APRIL 27, 2012

FACTS: Miles was civilly committed to the custody of the Secretary of the Kansas Department of Social and Rehabilitation Services (SRS) in December 2001. Since that time, he has been a resident in the Sexual Predator Treatment Program (SPTP) at Larned State Security Hospital. In January 2008, Miles filed a pro se petition for discharge or transitional release and requested that the district court appoint an expert to examine him and provide testimony in support of his petition. On January 31, 2008, the court summarily denied Miles’ petition and his request to have an expert appointed. On ap-
peal, a panel of this court reversed and remanded to the district court with directions to make a finding regarding whether an independent evaluation was “necessary” under the circumstances. Following remand, the district court ultimately granted the request for an independent assessment and, on March 16, 2010, appointed Dr. Stanley Mintz to evaluate Miles. Mintz met with Miles on May 12, 2010, and prepared a psychological evaluation report. Mintz stated in his report that he believed Miles had made “tremendous progress” during his time at Larned and that Miles “does not appear to be a violent sexual predator at this time.” Mintz recommended that Miles be considered for advancement to transitional release with a goal of eventual release from the program. On August 30, 2010, the district court held a hearing on Miles’ petition for discharge or transitional release. After taking the matter under advisement, the court held the evidence presented did not amount to probable cause to believe that Miles’ mental abnormality had so changed that it was safe to place him in transitional release.

ISSUES: (1) Sexual offender release and (2) hearing

HELD: Court held the evidence presented at the hearing was sufficient to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that Miles’ mental abnormality has so changed that he is safe to be placed in transitional release. Notably, our probable cause determination does not entitle Miles to transitional release; instead, it merely requires the district court to conduct an evidentiary hearing on the issue of whether transitional release is appropriate. At that hearing, the state again has the burden to prove beyond a reasonable doubt that the committed person’s mental abnormality or personality disorder remains such that the person is not safe to be placed in transitional release and if transitonally released is likely to engage in acts of sexual violence.

STATUTE: K.S.A. 59-29a02, -29a07, -29a08

TAX APPEAL AND SALES TAX
IN RE TAX APPEAL OF CESSNA EMPLOYEES CREDIT UNION
KANSAS COURT OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS
NO. 105,139 – APRIL 6, 2012

FACTS: In 2006, Jack Henry and Associates (JHA) sold taxable goods and services to Cessna Employees Credit Union (CECU). JHA invoiced CECU for the services, hardware and software. JHA separately invoiced CECU for the Travel Purchases (JHA employees’ transportation, meals, and lodging). CECU sought a refund of Kansas sales tax in the amount of $3,333.05 it paid to JHA on the costs of the Travel Purchases. JHA Travel Purchases were necessary to complete JHA’s taxable contractual obligations to CECU. The Kansas Court of Tax Appeals (COTA) granted summary judgment against CECU. COTA concluded that travel expenses billed by JHA to CECU were “part of the total amount of consideration given by CECU in the transaction for which the taxable goods and services were sold” and thus subject to Kansas retailers sales tax as part of the “gross receipts” of JHA in the transaction.

ISSUES: (1) Tax appeal and (2) sales tax

HELD: Court held that under the facts of this case, when a buyer merely reimburses a seller’s travel expenses and associated sales tax and separately invoices those in connection with that seller’s sale at retail of computer upgrade goods and services, the reimbursement and associated tax amounts are not again subject to retail sales tax in Kansas because they were not sold at retail, they were not a part of the sale of goods and services, and they were not a part of the selling price of the goods and services. Court also held that based upon the lack of imposition authority for retail sales tax to be collectable on travel expenses and associated sales tax already paid by the vendor and separately invoiced to a purchaser of taxable goods and services for mere reimbursement, any such sales tax paid is subject to refund. Court ordered a refund to CECU.

STATE V. BEHRENDT
RENO DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,222 – APRIL 27, 2012

FACTS: Behrendt was employed by City Beverage, a beer distributor located in Hutchinson, Kansas. Behrendt was charged under an amended complaint with felony theft for stealing beer from City Beverage valued between $1,000 and $25,000. He was also charged with conspiracy to commit felony theft and with selling liquor without a license, a misdemeanor. Behrendt later pled no contest to one count of felony theft. The trial court imposed a guidelines sentence of 6 months in prison. The trial court further ordered that Behrendt serve a 45-day jail sanction followed by 12 months of probation. In addition, the trial court ordered restitution to the victim in the amount of $7,870.55. Behrendt challenged the trial court’s use of the retail value of beer, a perishable good, instead of the wholesale value in calculating the amount of restitution.

ISSUE: Restitution

HELD: Court held that when crime victims have purchased their business inventory at wholesale prices rather than at retail market prices and when they can replace their missing or damaged inventory at similar wholesale prices, they have lost no retail sales because of the missing or damaged inventory. As a result, restitution based on retail market prices is not a defensible restitution figure. Court also held the trial court did not err in ordering Behrendt to serve 45 days in jail as a condition of his probation.

DISSENT: Judge Hill dissented and would hold the trial court did not abuse its discretion when it considered the opportunity costs as a factor to be included in any restitution order.

STATUTE: K.S.A. 21-3701, -4610

STATE V. BRAUN
JOHNSON DISTRICT COURT – REVERSED
NO. 103,560 – MARCH 30, 2012

FACTS: Braun convicted of blackmailing his ex-wife’s husband. Braun appealed, claiming victim did not take any action that Braun sought to compel him to take. Conviction is reversed. State not entitled to try Braun a second time if crime victim took any action that Braun sought to compel him to take. State did not abuse its discretion when it considered the opportunity costs as a factor to be included in any restitution order.

STATUTES: K.S.A. 77-601, -621; and K.S.A. 79-3602, -3603, -3604

CRIMINAL

STATE V. UNREIN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,824 – APRIL 20, 2012

FACTS: Unrein was charged with two counts of aggravated assault, one count of criminal threat, and one count of criminal possession of a firearm. The state alleged that Unrein had committed the aggravated assaults “with a deadly weapon, to-wit: Stevens Brand .410 gauge single shotgun.” Unrein pled guilty to two counts
of attempted aggravated assault and one count of criminal threat. The prosecutor proffered the facts that the state would prove at trial. Those facts included that Unrein “picked up [a] shotgun, put [in] a bullet [sic], cocked the gun, put it to the back of [one victim’s] head,” and that when another victim “arrived home ... [Unrein] was pointing the shotgun at him.” At the sentencing hearing, Unrein’s counsel asked the district court not to impose KORA’s registration requirement, claiming the intention of the state and defense was that Unrein would not have to register as an offender. The state denied there was any agreement regarding the registration requirement. The district court found Unrein had used a deadly weapon in the commission of the two attempted aggravated assaults and ordered him to register as an offender under K.S.A. 22-4902.

ISSUE: Offender registration

HELD: Court held that under the facts of this case, the district court’s factual finding that the defendant used a deadly weapon in the commission of two attempted aggravated assaults, which resulted in the court’s order for the defendant to register under the Kansas Offender Registration Act, K.S.A. 22-4902(a)(7), did not violate the Sixth and 14th amendments of the U.S. Constitution.

STATUTES: K.S.A. 21-3301, -3410, -3419, -4204; and K.S.A. 22-4902, -4903, -4904

STATE V. WOMELSDORF
ANDERSON DISTRICT COURT – AFFIRMED
NO. 105,880 – APRIL 12, 2012

FACTS: Womelsdorf told KBI investigators that two men had kidnapped her, tied her to her bed post, abused her and later lit her truck on fire which spread to the house. Fire investigators did not find any evidence to support Womelsdorf’s story and actually contradicted the story. The state charged Womelsdorf of individual counts of arson, committing a fraudulent insurance act, and making a false information. The false information count was dismissed and a jury convicted Womelsdorf of arson and committing a fraudulent insurance act. Womelsdorf claimed: (1) there was insufficient evidence to support both convictions; (2) the district court committed reversible error in the procedure it followed in responding to a jury question during deliberations; (3) the district court committed reversible error when it accepted the jury’s verdict without inquiring into the accuracy of the verdict; and (4) the district court committed reversible error by improperly instructing the jury on reasonable doubt.

ISSUES: (1) Sufficiency of the evidence, (2) jury deliberations, (3) accurate verdict, and (4) jury instructions

HELD: Court found there was sufficient evidence to support both convictions. Court also held the district court’s response to the jury question did not misstate the law or the evidence. Instead, the answer merely informed the jury that the requested documents were not available and the jury must consider only the evidence admitted during the trial. Essentially, the district court’s response restated an instruction that initially had been provided to the jury. The answer did not provide any additional information which could have changed the jury’s verdict. Furthermore, the answer did not place undue emphasis on whether the jury should find Womelsdorf guilty or not guilty. Court concluded beyond a reasonable doubt that the district court’s procedure of submitting the answer in written form rather than calling the jury into the courtroom had no impact on the outcome of the trial. Court also held that because Womelsdorf declined the district court’s explicit request to have the jury polled, which would have accomplished the same purposes as having the district court inquire into the accuracy of the verdict, it concluded she was not allowed to challenge the procedure for accepting the verdict for the first time on appeal. Court held the language of the jury instruction on reasonable doubt given at Womelsdorf’s trial was identical to the instruction recommended in PIK Crim. 3d 52.02 prior to 2005. The Kansas Supreme Court had previously held that this version of PIK Crim. 3d 52.02 accurately reflected the law of this state and properly advised the jury in a criminal case of the burden of proof, the presumption of innocence, and reasonable doubt.

STATUTES: K.S.A. 21-3718(a)(1)(B); K.S.A. 22-2602, -2603, -3414, -3420(3), -3421; K.S.A. 40-2,118(a); and K.S.A. 60-1507

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OFFICE SPACE AVAILABLE. One office (approximately 14” x 15”) is available in AV-rated firm located at Metcalf and 110th Street in the Commerce Plaza Building in Overland Park. Available immediately. Excellent location and a Class A building. Recently redecorated. Furniture not included. Competitive price including all the amenities of a full service law firm (phone, Internet access, copier, fax, coffee galley, etc.). Staff support available if needed. Please contact Tara Davis at (913) 498-1700 or tdavis@ktplaw.com.

OFFICE SPACE AVAILABLE. Great space for attorney, businessperson, or CPA. Up to 3,000 feet available, conference room, security system, easy access to downtown Topeka or interstate. Call Bob Evenson at (785) 231-7987.

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A TRADITION OF CREDIBILITY AND SUCCESS

We are plaintiff’s trial attorneys with a long tradition of credibility and success in the courtroom. Because of this tradition of success, our substantial resources and our unparalleled experience, we have maximized the value of cases referred to our firm for over 40 years and will continue to do so into the future.

If you have a client with a catastrophic injury or death case we would welcome a referral or co-counsel relationship with you.